Supreme Court, U.S.
FILED

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No.

In The
Supreme Court of the United States
October Term, 1996

LORI G. McKENZIE,

Petitioner,

v.

RENBERG'S, INC., and ROBERT L. RENBERG,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Whether a personnel director, who has formed a good faith belief that her employer is violating the overtime pay requirements of the Fair Labor Standards Act, engages in "protected activity" under §15(a)(3) of the Act when she reports her belief to the company's attorney and then to its President and principal owner, persists in that belief and then is fired in retaliation for expressing her belief.

LIST OF PARTIES

Lori G. McKenzie, Petitioner

Renberg's, Inc., and Robert L. Renberg, Respondents

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Lori G. McKenzie, respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

McKenzie v. Renberg's, Inc., 94 F.3d 1478 (10th Cir.1996).

The opinion of the Court of Appeals is reported at 94 F.3d 1478(10th Cir. 1996) and is reproduced in the Appendix filed herewith. The unreported opinions of the district court in the case are also reproduced in the Appendix filed herewith.

STATEMENT OF JURISDICTION

The judgment sought to be reviewed in this Court was entered by the Court of Appeals for the Tenth Circuit on September 4, 1996. After the timely filing of a Petition for Rehearing, the Court of Appeals entered its Order denying the Petition for Rehearing on October 22, 1996.

This Court has jurisdiction to review the judgment of the Court of Appeals on writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

§ 215. Prohibited acts; Prima facie evidence

(a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person--

> (3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

29 U.S.C. § 215(a)(3)

STATEMENT OF THE CASE

Material Facts

Lori G. McKenzie (the Petitioner) was employed as the Personnel Director of Renberg's, Inc. (a Respondent), from May, 1985 to September 20, 1991. In her capacity as Personnel Director, Petitioner was responsible for monitoring compliance with State and Federal equal employment opportunity laws, wage and hour laws, and other laws regulating the workplace. She was also responsible for the hiring, training, and firing of employees. See Answer Brief of Appellee, pp. 6, paragraphs 2 and 7, and 4.

In August, 1991, a co-worker of Petitioner, Marsha McElroy (the Controller of Renberg's), attended a seminar on wage and hour laws and received various informational materials. At McElroy's request, Petitioner reviewed these materials, discussed them with McElroy, and became concerned that the company was not properly paying overtime to certain of its sales associates and certain department

managers, in violation of the Fair Labor Standards Act. See Answer Brief of Appellant, p. 5, paragraphs 1 and 2.

Petitioner based her concerns upon her knowledge of the workers and upon her six years of experience in serving as Personnel Director. To investigate the wage and hour issue further, Petitioner reviewed time cards of employees and reviewed a computer printout of employees showing rates of pay, which she asked a payroll manager to produce. See App. App. 66-76.

After reviewing these materials and discussing the issues with McElroy, Petitioner sought a meeting with the company attorney who she had been directed to consult on personnel issues. With the results of her investigation, the computer printout, and a company manual, Petitioner and McElroy met with the company attorney on September 4, 1991 to discuss their concerns. Petitioner explained her concerns to the attorney, showed him the materials and the computer printout and expressed her belief that the method of compensating certain sales associates and certain department managers violated the Fair Labor Standards Act. After her meeting with the attorney, Petitioner, on two occasions, told the company president and principal owner of the company, Robert L. Renberg (a Respondent), that she had discussed her concerns about the perceived wage and hour violations with the company attorney. She had the impression that Mr. Renberg had discussed the matter with the attorney. Subsequently, Petitioner continued to discuss her concerns with McElroy and began to fear for her job. See App. App. pp. 78-85, 88-90.

After the meeting with the company attorney, Petitioner became the subject of an internal security investigation. On September 20, 1991, Petitioner was terminated by Respondents. After her termination, Petitioner contacted the Department of Labor and later filed a complaint. See App. 56-7.

Procedural Background

Petitioner brought this action in the District Court against Respondents, asserting that she was terminated in violation of the anti-retaliation provisions of the Fair Labor Standards Act, 29 U.S.C. § 215(a)(3). The District Court had jurisdiction pursuant to the provisions of 29 U.S.C. §216(b) and 28 U.S.C. §1331. See Appellant's Brief in Chief, pp. 2-4.

The trial was conducted in three stages, with the question of liability decided first, followed by the jury's determination of back pay and compensatory damages, and finally, of punitive damages. The evidence presented at trial was disputed. The Petitioner presented evidence tending to show that her termination was on account of her reporting her concerns of wage and hour violations to the company attorney and to the company president. The Respondents presented evidence tending to show that Petitioner was terminated for two separate non-retaliatory reasons. At the close of the liability phase of the trial, the District Court instructed the jury that "good faith reporting or communicating concerns regarding possible FLSA violations is protected activity". Respondents objected to this instruction. See Appendix B, p. 25a-26a, 33a, Opinion of the Tenth Circuit.

After deliberating on the liability phase, the jury concluded that the Respondents' asserted non-retaliatory reasons for discharging Petitioner were pretextual and returned a special interrogatory finding that Petitioner was terminated in retaliation for reporting her belief that Renberg's, Inc. was in violation of the Fair Labor Standards Act. See Appendix B, p. 26a, Opinion of the Tenth Circuit.

After the two damages phases of the trial, the jury returned verdicts awarding Petitioner $100,000 in back pay, $175,000 in emotional distress damages, and $50,000 in punitive damages. On July 15, 1994, the District Court issued its findings of fact and conclusions of law, granted judgment in favor of Petitioner for back pay and liquidated damages, and made other rulings not relevant here. See App. 25-31.

Respondents then filed a Motion for Judgment as a Matter of Law under Fed. R. Civ. P. 50, or in the alternative, a Motion for New Trial under Fed. R. Civ. P. 59. The District Court granted the Motion for Judgment as a Matter of Law, and ruled that the Motion for New Trial was moot. See Appendix B, p. 26a Opinion of the Tenth Circuit.

Petitioner timely perfected her appeal of the District Court's ruling on Respondents' Motion for Judgment as a Matter of Law. The Court of Appeals for the Tenth Circuit ruled that sufficient evidence existed to submit to the jury the question of the "but for" cause of the Petitioner's termination. However, the Court of Appeals affirmed, holding that Petitioner did not engage in protected activity under §15(a)(3) of the Act when, in her capacity as Personnel Director, she

undertook to advise Renberg's, Inc. that its wage and hour policies were in violation of the FLSA. See Appendix B, p. 35a Opinion of the Tenth Circuit.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD GRANT A WRIT OF CERTIORARI BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

Introduction

The issue in this case is whether the legal duty imposed on a personnel director by the Fair Labor Standards Act should be preferred over the personnel director's status as a member of management. The Court of Appeals would require a personnel director to "cross the line" from being a management employee to taking a position adverse to the company. In other words, a personnel director, the Court of Appeals would say, is the company itself. So, unless she steps out of her role as personnel director and takes a role as adversary or opponent, she is not speaking or acting separate from the company. The company is essentially speaking to itself.

In this, the Court of Appeals erred. Its concept is fundamentally flawed, as it violates the intent of Congress and the remedial purpose of the Fair Labor Standards Act.

A.

THE ANTI-RETALIATION PROVISIONS OF §15(a) (3) HAVE BEEN GIVEN BROAD AND LIBERAL CONSTRUCTION IN ORDER TO IMPLEMENT THE REMEDIAL PURPOSES OF THE FAIR LABOR STANDARDS ACT.

This Court has directed that a broad and liberal construction of the Fair Labor Standards Act should be applied so as to implement the intent of Congress. In Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288 (1960), this Court reviewed the means Congress intended to be used to effectuate enforcement of the Fair Labor Standards Act. Primary among them was that Congress determined that enforcement of the Act would best be enhanced by information brought forward by employees. There, Mr. Justice Harlan wrote:

> [Congress] chose to rely on information and complaints received from employees seeking to vindicate rights claimed to have been denied . . . for it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions. [citation omitted] By the proscription of retaliatory acts set forth in §15(a)(3), . . . Congress sought to foster a climate in which compliance with the

> substantive provisions of the Act would be enhanced.

361 U.S. 288, 292.[1]

The Courts of Appeals and the District Courts have with almost total uniformity employed this broad and liberal construction of the Act when applying the provisions of §15(a)(3). Accordingly, courts have held that an employee who gives a statement to the Wage and Hour Division of the Department of Labor is protected even though that employee has not "filed any complaint", but has merely communicated with investigators, Daniel v. Winn-Dixie Atlanta, Inc., 611 F.Supp. 57 (N.D.Ga. 1985). Likewise, §15(a)(3) has been held to protect an employee who insisted on receiving or refused to return to the employer an award of unpaid wages obtained for him by the Department of Labor, Brock v. Casey Truck Sales, 839 F.2d 872 (2nd Cir. 1988); Brennan v. Maxey's Yamaha, Inc., 513 F.2d 179 (8th Cir. 1975).

Using the same broad and liberal construction, §15(a)(3) has been held to prohibit retaliation against an employee whose employer mistakenly believed he had filed a

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[1] In Tennessee Coal, Iron & R.Co. v. Muscoda Local No. 123, 321 U.S. 590 (1944), the Court had earlier noted that the provisions of the Act relating to overtime pay were "remedial and humanitarian in purpose". The Court went on to say: We are not here dealing with mere chattels or articles of trade but with the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others. Those are the rights that Congress has specifically legislated to protect. Such a statute must not be interpreted or applied in a narrow, grudging manner.
321 U.S. 590, 597.

claim under the Act, Saffels v. Rice, 40 F.3d 1546 (8th Cir. 1994); Brock v. Richardson, 812 F.2d. 121 (3rd Cir. 1987). The Section has also been applied to protect an employee who engaged in activity on behalf of a co-worker, York v. City of Wichita Falls, 944 F.2d 236 (5th Cir. 1991), Drollinger v. State of Arizona, 962 F.2d 956 (9th Cir. 1992), and an employee who asserted the rights of a spouse, Marshall v. Georgia Southwestern College, 489 F.Supp. 1322 (M.D.Ga. 1980).

Extending this Court's broad and liberal interpretation, §15(a)(3) has also been applied to complaints communicated to the employer itself. In Love v. RE/MAX of America, Inc., 738 F.2d 383 (10th Cir. 1984), the Court of Appeals for the Tenth Circuit held that a vice-president's request for a pay raise to her superior, with a copy of the Equal Pay Act attached, was protected under §15(a)(3), citing this Court's decision in Mitchell v. DeMario, supra. See also, EEOC v. White and Son, 881 F.2d. 1006 (11th Cir. 1989); and EEOC v. Romeo Community Schools, 976 F.2d 985 (6th Cir. 1992).

The Decision of the Court of Appeals in this case paid lip service to its earlier decision in Love and to that of the Sixth Circuit in Romeo Community Schools (App. B, p. 35a). Yet, the Court refused to extend its earlier holding to the conduct of the Petitioner in this case.

While the Court did not cite any authority for its holding, the key to its decision seems to be its statement that the Petitioner never "crossed the line" from being an employee merely performing her job as Personnel Director to an employee "asserting a right adverse to the company" (App. B, p. 37a). Rather, the Court noted, the Petitioner, in her

capacity as personnel manager, merely informed the company that it was at risk of claims that might be instituted by others as a result of its alleged FLSA violations (App. B, p. 35a). In order to engage in protected activity under §15(a)(3), the Court of Appeals would require the Petitioner to "step outside his or her role of representing the company" (App. B, p. 36a).

Therein lies the error of the Court of Appeals' decision in this case. The Court failed to apply the broad and liberal interpretation of the Act that has been adopted by this Court. In order to give effect to the "remedial and humanitarian" purposes of the Act, the Court should have held that the District Court's instruction was correct as a matter of law; that is, that "the good faith reporting or communicating concerns regarding possible FLSA violations is protected activity".

B.

THE COURT OF APPEALS FAILED TO RECOGNIZE THAT THE FAIR LABOR STANDARDS ACT IMPOSES INDEPENDENT LEGAL DUTIES UPON A PERSONNEL DIRECTOR.

The Petitioner in this case was the Personnel Director of a corporation operating retail department stores. In that position, her job responsibilities required her to hire, train, discipline and fire employees and to maintain the corporation's compliance with the Fair Labor Standards Act and other laws governing employees and the workplace. The Petitioner is therefore not an officious meddler or a stranger

to the corporation's compliance with the Fair Labor Standards Act. Congress has specifically mandated for her a function separate and apart from her function as a management employee. She is independently liable, both civilly and criminally, for the company's compliance with the Act.

Status as a "person" under the Act

Congress specifically intended that an employee having the duties of the Petitioner occupy a unique position, with its own legally cognizable duties. By its terms, §15(a) makes it unlawful for any "person" to violate the provisions of §6 of the Act (relating to minimum wage), or §7 of the Act (relating to overtime pay), or §15(a)(3) of the Act (relating to retaliation under the Act). Under the provisions of §16(a) of the Act [29 U.S.C. §216(a)], any "person"[2] who willfully violates any of the provisions of §15 is subject to criminal prosecution, and upon conviction is subject to fines or imprisonment, or both.

Thus, a personnel director who willfully maintains compensation plans which do not comply with the Act, or a payroll supervisor who knowingly pays employees less than they are entitled to under the Act may be convicted under the Act. See, Meek v. United States, 136 F.2d. 679 (6th Cir. 1943). This threat to the liberty interest of a "person" under the Act is direct and independent of any other legal relationship. This threat of criminal liability sets a personnel

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[2] Under the Act, "person" is defined as "an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons," §3(a) [29 U.S.C.§203(a)].

director apart from other management employees, and apart from the corporation itself.

Status as an "employer" under the Act

Moreover, a personnel director can be held to be an "employer" under the Act and therefore may be subject to civil liability, as well. Section 16(b) of the Act provides that any "employer"[3] who fails to pay the minimum wage or overtime pay to an employee or who discharges or discriminates against an employee in violation of §15(a)(3) of the Act shall be liable for the damages allowed under the Act.

The district courts and courts of appeals have not hesitated to apply the definition of "employer" to cover management employees. See Dole v. Haulaway, Inc., 723 F.Supp. 274 (D.N.J. 1989). (corporate officers exercising control, including a payroll supervisor, are "employers"): McLaughlin v. Lunde Truck Sales, Inc., 714 F.Supp. 920 (N.D. Ill. 1989) (president of corporation was an "employer"); Shultz v. Falk, 439 F.2d. 340 (4th Cir. 1971) (rental agents who hire, fire and supervise building workers are "employers"); Estevez v. Hayes, 1990 W.L. 605076 (D.Or. 1990) (contractor who hired and fired agricultural workers was an "employer"); Donovan v. Sabine Irrigation Co., Inc., 695 F.2d. 190 (5th Cir. 1983) (president of corporation is an "employer"); and Donovan v. Agnew, 712 F.2d. 1509 (1st Cir. 1983) (corporate officers with significant ownership interest and operational control of corporation's

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[3] Under Section 3(d) of the Act, an "employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee, [29 U.S.C.§203(d)].

day to day functions including compensation of employees are "employers").

As is the case with criminal liability imposed upon a "person", civil liability attaches to an "employer" whether or not the actual corporate employer is also sued. Civil liability, as created by the Act, is separate and apart from the employee's relationship to the actual employer. It is an independent legal duty mandated by Congress and imposed by the Act. It cannot be waived or defended or explained away by a claim that the employee was merely "doing her job".

The record in this case demonstrates that as the normal incidents of her duties as personnel director, Petitioner had responsibility for hiring and firing of employees, of supervising and training them and maintaining their method of compensation in compliance with provisions of applicable law[4]. Petitioner, therefore, at the times of her meetings with the company attorney and with the company president, was both a "person" subject to criminal liability and an "employer" subject to civil liability under the Act. Her expressions of her belief that the company was violating the Act were by law her own separate acts, not the company's, because they were founded on a separate duty imposed on her alone. To require her to take additional actions to set her apart from her corporate employer in order to be protected under the Act is erroneous as a matter of law.

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[4] These facts were admitted by the Respondents in the court below (Appellee's Answer Brief, page 7) and are binding upon them in this Court.

C.

THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE POSITION OF THE SECRETARY OF LABOR UNDER OTHER FEDERAL STATUTES GUARANTEEING THE PROTECTION OF EMPLOYEES.

The Decision of the Court of Appeals conflicts with the position taken by the Secretary of Labor and by the Courts of Appeals in decisions under other federal statutes protecting employees from retaliation.

Congress has conferred upon the Secretary of Labor the responsibility to enforce seven federal statutes guaranteeing employees' freedom from employer retaliation[5]. Those statutes are (or, have been, at relevant times) in their material provisions identical to §15(a)(3) of the Fair Labor Standards Act. According to its statutory duty, the Department of Labor provides an administrative remedy for employees who have been discharged or discriminated against because they engaged in protected activity. To accomplish that duty, the Department has promulgated Regulations which define the activity which is protected under each of these statutes.

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[5] Safe Drinking Water Act, 42 U.S.C. §300j-9(I); Federal Water Pollution Control Act, 33 U.S.C. §1367; Toxic Substances Control Act, 15 U.S.C. §2622; Solid Waste Disposal Act, 42 U.S.C. §6971; Clean Air Act, 42 U.S.C. §7622; Energy Reorganization Act of 1974, 42 U.S.C. §5851; and Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §9610.

In its Regulations, 29 C.F.R. §24.2(b)(3), the Department considers that any employee who has (among other things):

> Assisted or participated, or is about to assist or participate . . . in any other action to carry out the purposes of such Federal statute.

has engaged in "protected activity".

This Regulation has been upheld as a valid exercise of the Secretary's authority under various statutes[6], notwithstanding that the reporting of illegalities was a part of the employee's job, and the employee did not "cross the line". See, for example, Passaic Valley Sewerage Commissioners v. United States Department of Labor, 992 F.2d 474 (3rd Cir. 1993), cert. denied 510 U.S. 964 (1993). There, in reliance upon this Court's decision in Chevron,

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[6] Energy Reorganization Act (prior to changes effected in 1992): Kansas Gas & Electric Company v. Brock, 780 F.2d 1505 (10th Cir. 1985), cert. denied 478 U.S. 1011 (1986); Mackowiak v. University Nuclear Systems, Inc., 735 F.2nd 1159 (9th Cir. 1984); Norris v. Lumbermen's Mutual Casualty Company, 881 F.2d 1144 (9th Cir. 1989); and Bechtel Construction Company v. Secretary of Labor, 50 F.3d 926 (11th Cir. 1995).

Unspecified federal environmental laws: Pogue v. Department of Labor, 940 F.2d 1287 (9th Cir. 1991) (employee sent seven internal reports and a letter to her superior reporting environmental violations).

Clean Water Act: Passaic Valley Sewerage Commissioners v. United States Department of Labor, 992 F.2d 474 (3rd Cir. 1993) , cert. denied 510 U.S. 964 (1993) (pollution control chief of a sewage treatment plant wrote internal memoranda criticizing the plant's use of a water sampling technique). There Secretary of Labor found, and the Third Circuit affirmed, that the firing was in retaliation for the chief's internal memoranda, in violation of §507 of the Clean Water Act.

USA, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), the Court of Appeals held that the Secretary's Regulations interpreting the term "proceeding" under § 507(a) of the Clean Water Act to include intra-corporate complaints was reasonable in light of the Act's remedial intent, 992 F.2d 474, 480.

Therefore, the Secretary of Labor advocates that "assisting . . . . in any other action to carry out the purposes" of a federal statute constitutes protected activity. The Courts of Appeals hold that the Secretary's interpretation is reasonable in light of the policies sought to be served by Congress. Neither the Regulations nor the Secretary nor the Courts of Appeals in those cases require the employee to "cross the line" from simply doing his or her job to taking an adversary position against the employer. Doing so, the courts have held, would be inimical to Congressional intent in passing the statutes there at issue.

The same is true in this case. The Court of Appeals' requirement that Petitioner step outside her role as Personnel Director conflicts with the pattern of enforcement that Congress intended to obtain under the Fair Labor Standards Act.

D.

ALLOWING THE COURT OF APPEALS' DECISION TO STAND WILL VIOLATE THE PUBLIC INTEREST.

The duty to enforce various provisions of the Fair Labor Standards Act has been accorded the dignity of a

"public right". Petitioner, therefore, had a congressionally-mandated duty founded upon the public interest to urge the corporation to comply with the provisions of Section 7 of the Act governing overtime pay to employees. By researching, documenting and voicing her concerns to her employer that Renberg's was not paying overtime pay to two broad categories of employees as required by the Act, the Petitioner was vindicating a public right. She cannot be required, as did the Court of Appeals, to step outside her role as Personnel Director in order to be protected under §15(a)(3) of the Act.

In Mourde v. Massachusetts Cities Realty Co., 47 F.Supp. 668 (D.Mass. 1942), the district court stated, in an action to recover overtime compensation and liquidated damages under the Act:

> It is true that an action under Section 16(b) is one to enforce a private or individual right. However, it is one in which the public has a decided interest. It is one method by which the congressional conception of public policy is enforced. [citing U.S. v. Darby, 312 U.S. 100 (1941), as amended 312 U.S. 657 (1941)]
>
> The main purpose of the entire Act is to maintain a decent standard of living for employees engaged in commerce or the production of goods for commerce. (citation omitted)
>
> Consequently, the liability of an employer under the Act is something more

> than a debt or liability to an individual. (citation omitted) An employee, exercising his rights under Section 16(b) of the Act, exercises them, not only for his own benefit, but for the benefit of the general public. Consequently, public policy demands that such exercise be not unnecessarily hampered.

47 F.Supp. 668, 670-71.

This Court has agreed that the rights invoked by an employee under the Act vindicate a congressionally-recognized public interest. In Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1945), this Court considered the question of whether an employer may require its employees to waive their right to recover liquidated damages under the Fair Labor Standards Act. There the Court noted:

> Where a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate. With respect to private rights created by a federal statute, such as Section 16(b), the question of whether the statutory right may be waived depends upon the intention of Congress as manifested in the particular statute . . .
>
> Neither the statutory language, the legislative reports nor the debates indicates that the question at issue was specifically

> considered and resolved by Congress. In the absence of evidence of specific Congressional intent, it becomes necessary to resort to a broader consideration of the legislative policy behind this provision as evidenced by its legislative history and the provisions in and structure of the Act. . . . Such consideration clearly shows that Congress did not intend that an employee should be allowed to waive his right to liquidated damages.

324 U.S. 697, 704-6.

The Court went on to state:

> No one can doubt but that to allow waiver of statutory wages by agreement would nullify the purposes of the Act. We are of the opinion that the same policy considerations which forbid waiver of basic minimum and overtime wages under the Act also prohibit waiver of the employee's right to liquidated damages.

324 U.S. 697, 707.

Given the public interest in the rights of employees to be paid their due under the Act, a personnel director who is attempting to vindicate these rights must be safe from retaliation. The Decision of the Court of Appeals threatens to violate public interest in the enforcement of the Act, and should therefore be reviewed by this Court.

E.

ALLOWING THE COURT OF APPEALS' DECISION TO STAND WILL THREATEN ENFORCEMENT OF THE FAIR LABOR STANDARDS ACT.

Congress specifically intended that employees should be free from the chilling effect of retaliation. As this Court noted in Mitchell v. DeMario, supra.:

> To an employee considering an attempt to secure his just wage deserts under the Act, the value of such an effort may pale when set against the prospect of discharge and the total loss of wages for the indeterminate period necessary to seek and obtain reinstatement.... We cannot read the Act as presenting those it sought to protect with what is little more than a Hobson's choice.

361 U.S. 288, 292-93.

A personnel director suffers no less from the weight of this "Hobson's choice" than the hourly worker. Unless the Court of Appeals' decision in this case is reversed, personnel directors will be unwilling to freely and openly discuss their concerns that their employer is violating the Act. The channels of internal communication will be "dried up" by employer intimidation, just as this Court noted in NLRB v. Scrivener, 405 U.S. 117, 122-23 (1972). The effective enforcement of the Act will thus be impaired, as no personnel

director will be willing to voice her concerns for fear of retaliation.

The Court need not fear that to adopt Petitioner's position in this case under these facts will improperly intrude upon an employer's rightful expectation of loyalty from its management team. The courts have properly carved out exceptions for the abusive, the disruptive and the disloyal employee, Kahn v. United States Secretary of Labor, 64 F.3d 271 (7th Cir. 1995); Smith v. Singer Company, 650 F.2d 214 (9th Cir. 1981); and Novotny v. Great American Federal Savings & Loan Association, 539 F. Supp. 437 (N.D. Penn. 1982). The Petitioner clearly acted totally within the confines of her duties as Personnel Director, and Respondents made no claim otherwise in the court below.

Neither should the Court fear that to announce the rule proposed by Petitioner will grant the personnel director some sort of "super-tenure" from which she cannot be fired. In the trial court, Respondents attempted to prove that Petitioner was terminated for valid reasons. The jury, as the Court of Appeals noted, "was not convinced". The jury system provides ample protection from any abuse.

Rather, by adopting the position that a personnel director expresses her belief of illegalities under the Act to her superiors is engaging in activity protected under the Act, the Court will further the effective enforcement of the Act. Personnel directors will be encouraged to raise their concerns within proper management channels, where the problem (if one exists) may best be addressed and corrected. If the concern is ill-founded and is the result of misunderstanding, management will have the opportunity to

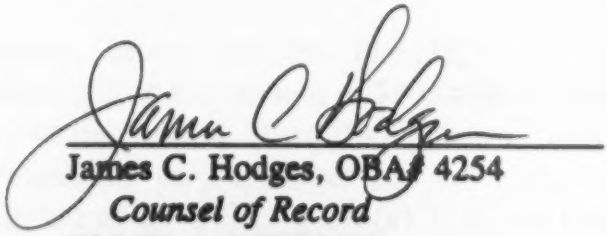
justify or explain its policies. The courts and the administrative channels available for complaints by employees will thereby be freed from needless claims which could have been handled more efficiently within the company itself.

In short, the protection of a personnel director from retaliation under these circumstances enhances the enforcement of the Fair Labor Standards Act. Leaving her unprotected will hamper and impair it.

CONCLUSION

This Court should grant a writ of certiorari to the Court of Appeals to address this important issue. Upon further review, the Court should reverse the decision of the Court of Appeals and hold, as a matter of law, that the Petitioner in this case was engaging in activity protected under §15(a)(3) of the Fair Labor Standards Act when she reported to the company attorney and the president and principal owner of her employer her belief that the company was violating the Act.

Respectfully submitted,



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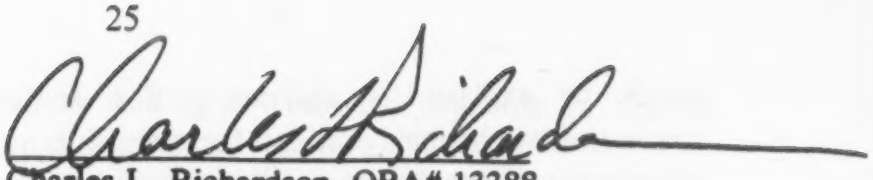

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APPENDIX A - OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA ENTERED SEPTEMBER ___, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Case No. 92-C-398-B

LORI G. MCKENZIE,
Plaintiff,

vs.

RENBERG'S, INC., and ROBERT L. RENBERG,
Defendants.

ORDER

The Court has for decision the motion for judgment as a matter of law pursuant to Fed.R.Civ.P. 50, or alternatively a motion for new trial pursuant to Fed.R.Civ.P. 59 (Docket #108) of the Defendants, Renberg's, Inc. and Robert L. Renberg.

The judgment herein for the Plaintiff, Lori G. McKenzie ("McKenzie"), in the amount of $103,966.00, was entered after a jury verdict finding Plaintiff's employment was terminated by Defendants on September 20, 1991, due to retaliation in violation of 29 U.S.C. § 215(a)(3) of the Fair

Labor Standards Act ("FLSA") [1].

Plaintiff, as personnel director of Defendant, Renberg's, Inc. (retail clothing business), following attendance at an FLSA-related seminar, had raised the issue approximately three weeks before her termination that perhaps certain management and/or commissioned sales employees were being denied overtime compensation in violation of the ELSA. The parties agreed that discharging the Plaintiff for said conduct would be a violation of 29 U.S.C. § 215(a)(3).

As nonpretextual legitimate reasons for Plaintiff's termination, Defendants offered evidence that Plaintiff, as personnel director, had improperly disclosed confidential information, and additionally, had participated in notarizing a written quid pro quo employment-related contract for sexual favors. The Defendants deny that Plaintiff, an at-will employee, was discharged in retaliation for her raising the FLSA matter.

Concerning an employee disseminating confidential information, even when done in support of a discrimination

---

[1] 29 U.S.C. § 215 **Prohibited acts; prima facie evidence**

(a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person--

* * *

(3) to discharge or in any other manner because such employee has file any complaint or instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, o has served or is about to serve on an industry committee; * * *"

charge, numerous cases have found that this and disloyalty is a legitimate reason for employee discharge. Jefferies v. Harris Cty. Community Action Ass'n, 615 F.2d 1025, 1036 (5th Cir. 1980); O'Day v. McDonnell Douglas Helicopter Co.,784 F.Supp. 1466, 1470 (D.Ariz. 1992); Baker v. Georgia Power Co., 27 Fair Empl. Prac. Cas. (BNA) 1301 (N.D.Ga. 1980); Herrera v. Mobil Oil. Inc., 53 Fair Empl. Prac.Cas. (BNA) 1406 (W.D.Tex. 1990); and Hamm v. Members of the Board of Regents of the State of Florida, 708 F.2d 647, 653 (11th Cir.1983).

Defendants also asserted defensively that the FLSA was integral to Plaintiff's job as personnel director, so any communications on the subject of the FLSA by Plaintiff could not be considered protected activity for purposes of a retaliation discharge claim. In support of this position, Defendants submit two law review articles: 35 S.Tex.L.Rev., No. 1, January 1994, p. 95, and B.C.L.Rev. Vol. 29:347. p. 391.

29 U.S.C. § 215(a)(3) protects all employees from being terminated for speaking up regarding good faith FLSA violations. This would include the Plaintiff as Renberg's, Inc., personnel director as well. Her position as personnel director should not be a *per se* exemption from § 215(a)(3) prohibition against a retaliatory discharge. See, Harris v. First National Bank of Hutchinson, Kansas, 680 F.Supp. 1489 (D.Kan. 1987); Harris v. Board of Public Util., 757 F.Supp. 1185 (D.Kan. 1991); and Francoeur v. Carroon & Black Company, 552 F.Supp. 403 (S.D.N.Y. 1982). Thus, the court concludes Plaintiff's conduct herein regarding reporting the possible FLSA violation is protected activity under § 215(a)(3).

In their motion for judgment as a matter of law, Defendants also assert that Plaintiff did not present evidence of pretext joining issue with Defendants' legitimate nondiscriminatory reasons for discharging Plaintiff. This failure, urged Defendants, entitles them to a judgment as a matter of law. Saint Mary's Honor Center v. Hicks, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993); Hooks v. Diamond Crystal Specialty Foods, Inc., 997 F.2d 793, 798 (10th Cir. 1993); Lovelace v. Sherwin-WilliamsCo., 681 F.2d 230, 242 (4th Cir. 1982); and Odima v. Westin Tucson Hotel Co., 991 F.2d 595, 600 (9th Cir. 1993). Thus, under Fed.R.Civ.P. 50, the court must determine from the record whether sufficient probative evidence exists to permit the trier of fact to decide the issue of pretext. Wright & Miller, Federal Practice & Procedure §2524 (1st ed. 1971).

Concerning Plaintiff's discharge due to retaliation in violation of 29 U.S.C. § 215(a)(3), for her good faith raising of possible FLSA violations, the Court does not consider it necessary to analyze in depth all of the trial evidence joining issue with Defendants' proffered legitimate nondiscriminatory reasons of Plaintiff's breaches of confidential information as pretextual[2].

Suffice it to say that when all of the evidence is viewed

---

[2] As long as the employee's protected activity complaint is in good faith, although centered in a mistake of fact, the employer is not permitted to retaliate. Love v. Re/Max of America, Inc., 738 F.2d 383, 385 (10th Cir. 1984).

in a light favorable to Plaintiff, and all reasonable inferences are granted thereto, the evidence is sufficient to submit the issue to the trier of fact[3].

The more compelling fact in this regard is the timing of Plaintiff's discharge being two to three weeks following her suggesting to Renberg's, Inc., management that perhaps there were FLSA violations. In the recent case of Candelaria v. E G & G Energy Measurements, Inc., 1994 WL 474233 (10th Cir. 1994), the court stated:

> "We are mindful that a retaliatory motive can be inferred from the fact that an adverse employment action follows charges by an employee against his/her employer. Such an inference can only be made, however, where 'close temporal proximity' exists between the bringing of charges and the subsequent adverse action. Smith v. Maschner, 899 F.2d 940, 948-49 (10th Cir. 1990)...."

See also, Miller v. Fairchild Industries, Inc., 797 F.2d 727, 731-33 (9th Cir. 1986), McDonald v. Hall, 610 F.2d 16, 18 (1st Cir. 1979), and Harris v. Fleming, 839 F.2d 1232, 1236-38 (7th Cir. 1988).

However, the evidence regarding Plaintiff's

---

[3] This is even in the face of Plaintiff's testimony that she had no evidence to refute that reasons given for her discharge were based on Defendant Robert L. Renberg's good faith reasonable belief that Plaintiff had engaged in employment-related misconduct (Tr. 178).

participation in the written *quid pro quo* contract for sexual favors presents a different matter. If this nonpretextual reason standing alone would support employment termination, a judgment as a matter of law is appropriate even though a factual issue exists regarding alleged retaliation pursuant to 29 U.S.C. § 215 (a) (3). Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989).

The relevant evidence concerning the *quid pro quo* sexual favor contract is as follows: In 1989, Plaintiff was the Renberg's, Inc., personnel director. As such, it was her job function to be involved with the hiring of retail sales personnel and she was the Renberg's, Inc., affirmative action officer concerning sexual discrimination and harassment. Plaintiff was also a notary public, and notarized Defendants' Exhibit 1 which states as follows:

> "September 26, 1989
>
> Brenda Jagels
> Dean Witter Reynolds
> 100 West 5th
> Suite 600
> Tulsa, OK 74103
>
> Dear Brenda,
>
> The purpose of this letter is to outline the terms of the agreement we reached in conversation Monday night September 25, 1989.

"AREA OF CONTENTION: Renberg's Christmas Bonus

TERMS OF THE AGREEMENT: Should Christmas bonuses not be paid in their usual manner to the employees of Renberg's, Inc., a company operating in Tulsa, Oklahoma, then David Childers will provide Brenda Jagels with the following:

(1) Fendi Parfum 1/4 oz
(1) Fendi EDT
(1) Fendi Body Lotion or Creme
(1) Erno Laszlo Eye Creme

However, should Christmas bonuses be paid then Brenda Jagels will provide David Childers with a very special and provocatively intimate evening; time, place and duration to be negotiated.

PAYMENT: Made on or before December 25, 1989."

Brenda, this letter is intended to be a binding contract. Please signify your agreement with the foregoing provisions by signing below and returning one copy for my file.

Sincerely,

/s/ David R. Childers
311 South Main
Tulsa, OK 74103

Accepted and agreed to this _____ day of _____ 1989.

/s/ Brenda S. Jagels
Brenda Jagels

Witnessed before me on this the 27 day of September, 1989.

/s/ Lori G. McKenzie
My commission expires _____, 198_."
(month, date and year unclear)

David R. Childers, at the time of Defendants' Exhibit 1, was a Renberg's, Inc., retail clothing store manager who was seeing Brenda Jagels socially. Brenda Jagels was a former Renberg's, Inc. employee who was an "on-call" Renberg's, Inc., employee during the holiday season.

In August 1991, David R. Childers ceased employment with Renberg's, Inc., and moved to the state of Washington. When Childers' Renberg's, Inc., desk was cleaned out, Defendants' Exhibit 1 was found therein. Robert Renberg testified that in late August or early September 1991, Defendants' Exhibit 1 was brought to his attention. In addition to Plaintiff's breaches of confidential personnel information, Robert Renberg concluded that Plaintiff's involvement with

Defendants' Exhibit 1, an employee *quid pro quo* sexual favor contract, was also justification for Plaintiff's discharge. When Robert Renberg terminated Plaintiff on September 20, 1991, he advised her he was discharging her as an employee because he had lost confidence in her.

Clearly, Defendants' Exhibit 1 alludes to a type of *quid pro quo* employee sexual favor contract that is condemned by Title VII, 42 U.S.C. § 2000(e) *et seq*; Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 91 L.Ed.2d 49, 106 S.Ct. 2399 (1986). The facts that Childers and Jagels signed Defendants' Exhibit 1, and that it was notarized before Plaintiff in the latter part of September, 1989, were undisputed. In Plaintiff's deposition she admitted reading Defendants' Exhibit 1 before she notarized it. (Tr. 191-192). At trial Plaintiff recanted her deposition testimony and said she had misunderstood the question, thinking the question was whether she had read Defendants' Exhibit 1 before at any time. (Tr. 191). In a filing with the court prior to trial, Plaintiff said, "Further Plaintiff admits that she read the document that she notarized but there was no evidence that Plaintiff approved of such contents of the document, only that she witnessed that two individuals signed a private noncompany-related document." (Tr. 193). It is disingenuous to assert that Defendants' Exhibit 1 is not company related when it proposes to exchange a company Christmas bonus for "a very special and provocatively intimate evening."

Concerning Defendants' Exhibit 1, Plaintiff testified as follows:

"Q. Now, in September of 1989, at that point you were the personnel director?

A. At what point?

Q. September of 1989.

A. Yes, I was.

Q. You weren't an assistant personnel director; you were the personnel director?

A. Yes.

Q. And wouldn't it be safe to assume that everybody in the company knew that?

A. Yes.

Q. And you were responsible for the Company's obligations in employment matters, were you not?

A. Yes.

Q. And you were responsible regarding matters of sexual harassment, were you not?

A. Yes.

Q. It was part of your responsibility, was it not, to

assure that there was a non-hostile work environment at the Renberg's stores, was it not?

A. Yes.

Q. And you were the person that if someone at the company felt they were a victim of harassment or a hostile work environment, they were supposed to come to you and tell you, right?

A. Yes.

Q. And when they came to you, then you were to investigate the matter and determine whether or not they had been harassed?

A. Yes.

Q. And if they had been harassed, you were to take care of the discipline on that?

A. Yes. (Tr. 181-183)

* * *

Q. Down here under the terms of the agreement under the 'however' paragraph it says, 'However, should Christmas bonuses be paid, then Brenda Jagels will provide David Childers with a very special, provocative, intimate evening, time, place and duration to be

negotiated.'

Now, does not on its face of that exhibit, that's exchanging sexual favors for a Christmas bonus. It's on the face of the document.

A. That's what it says.

Q. So you agree with me on its face that would be an illegal agreement under the law.

A. Yes. She was not an employee, but --

Q. It doesn't say that, does it?

A. No, it doesn't.

Q. It says will pay a Christmas bonus, and if you get paid a Christmas bonus, basically I get you, right?

A. That's what it says. (Tr. 195).

* * *

Q. So whether a statement is serious or is a joke, it can have the same bad effects, can it not?

A. It could.

Q. And from a third-party standpoint, if they're

offended it doesn't matter whether it's real or was a joke, does it?

A. True.

Q. So if you have someone other than Brenda out here, they could be offended by what they see happening in this instance, couldn't they?

A. Yes.

Q. And the mere fact that the parties to the transaction, who may find it acceptable, that still could impact another employee, couldn't it?

A. Yes.

Q. That could create -- be a part of what creates a hostile work environment for that third employee.

A. Yes.

Q. Call her Mary. Mary sees people having these kinds of agreements, she may believe she had a sexually charged work environment, may she not?

A. Yes.

Q. She's saying I'm not getting ahead, I'm not

getting these Christmas bonuses because I'm not being signed up for these agreements.

A. We're not talking about an employee, though, in this agreement.

Q. You testified that she had been employed and was an on-call employee at this time.

A. Yes.

Q. And there is nothing on this agreement that says, oh, by the way, I'm not an employee of Renberg's.

A. No, it does not. (Tr. 186-187)

* * *

Q. But your signature is there, is it not?

A. Yes, it is.

Q. And everybody knows you're the personnel director.

A. Yes, they do.

Q. You don't cease being personnel director when you notarize something, do you?

A. No.

Q. And looking at that document, does it not concern you that if some other employee saw that, it would appear that the personnel director is endorsing that kind of document that you yourself believe is improper?

A. It could.

Q. And you understand that such a document as this could be very damaging to Renberg's in any litigation during a sexual harassment or sexual discrimination?

A. Yes.

Q. This could put the company at risk.

A. Yes.

Q. And you don't deny that you signed it?

A. No, I do not.

Q. You notarized this at work, right?

A. Yes, I did. (Tr. 189)

* * *

Q. Is there anything on the face of that contract that would indicate to Bob Renberg that you didn't read it?

A. No.

Q. Is there anything on the face of that document that would indicate to Bob Renberg that that was a joke?

A. No.

Q. Do you regreat (sic) that your signature is on there?

A. Yes, I do.

Q. Do you believe it was mistake that it was on there?

A. I did make a mistake signing it, yes.

Q. Do you have any reason to believe that Bob Renberg was not upset by this?

A. No.

Q. The mere passage of time doesn't make it any less wrong, does it?

A. No." (Tr. 190-191)

Because of a handwritten date on the top right corner of a copy of Defendants' Exhibit 1 (Plaintiff's Exhibit 13), Plaintiff asserted at trial that Robert Renberg did not learn of the *quid pro quo* sexual favor contract (Defendants' Exhibit 1) until October 1991, approximately a month after Plaintiff's discharge. However, the law of this circuit is clear that after-acquired information that supports an employee's discharge may be relevant to uphold the employer's termination action. In Summers v. State Farm Mutual Automobile Insurance Co., 864 F.2d 700, 706 (10th Cir. 1988), the court cited Blalock v. Metals Trades, Inc., 775 F.2d 703, 712 (6th Cir. 1985), which stated an employer could avoid liability under Title VII by showing "that the adverse employment action would have been taken even in the absence of the impermissible motivation, and that, therefore, the discriminatory animus was not the cause of the adverse employment action." *See also*, O'Driscoll v. Hercules Inc., 12 F.3d 176, 178-79 (10th Cir. 1994), and Faulkner v. Super Valu Stores, Inc., 3 F.3d 1419, 1427 (10th Cir. 1993).

The testimony of Robert Renberg was that he was genuinely concerned with and could not condone Plaintiff's participation in Defendants' Exhibit 1. He testified that it was also a reason for Plaintiff's discharge. Plaintiff agreed that Robert Renberg, as president of Renberg's, Inc., could be expected to be upset over the implications of Defendants' Exhibit 1 for Renberg's, Inc. Even if Plaintiff did not read Defendants' Exhibit 1, as personnel director it was her job to supervise such personnel hiring arrangements and she was in charge of company affirmative action to prevent unlawful discrimination. Robert Renberg was within his rights as

president of Renberg's, Inc., to discharge Plaintiff because of her involvement in notarizing Defendants' Exhibit 1.

For the reasons set forth above, the Defendants' motion for judgment as a matter of law pursuant to Fed.R.Civ.P. 50 is hereby SUSTAINED and the judgment entered herein in favor of Plaintiff against the Defendants on the 19th day of July, 1994, is set aside. Defendants' alternative motion for new trial pursuant to Fed.R.Civ.P. 59 is, therefore, moot. Contemporaneous with the filing of this order a separate judgment is entered in favor of the Defendants, Renberg's, Inc. and Robert L. Renberg, and against the Plaintiff, Lori G. McKenzie.

DATED this _____ day of September, 1994.

/s/ Thomas R. Brett
THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

APPENDIX B - OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DATED SEPTEMBER 4, 1996

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 94-5197

LORI G. McKENZIE,
Plaintiff-Appellant,

v.

RENBERG'S INC., and ROBERT RENBERG,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Oklahoma
(D.C. No. 92-C-398-B)

James C. Hodges of Eller & Detrich, Tulsa, Oklahoma (Charles L. Richardson and Brad Smith of Richardson & Stoops, with him on the brief) for Plaintiff/Appellant.

Larry D. Henry of Arrington, Kihle, Gaberino & Dunn, Tulsa,

Oklahoma (Patrick W. Cipolla, with him on the brief) for Defendants/Appellees.

Before SEYMOUR, Chief Judge, TACHA and EBEL, Circuit Judges.

EBEL, Circuit Judge.

Plaintiff-Appellant Lori G. McKenzie brought this action against her former employer, Renberg's Inc., and its president, Robert Renberg (collectively "defendants"), asserting claims for retaliatory discharge in violation of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 215(a)(3), and wrongful discharge in violation of Oklahoma public policy. The district court dismissed McKenzie's state law wrongful discharge claim prior to trial under Fed. R. Civ. P. 12(b)(6). McKenzie received a favorable jury verdict on her retaliation claim, but the district court thereafter entered judgment as a matter of law for defendants. McKenzie now appeals these two rulings[4].

We have jurisdiction under 28 U.S.C. § 1291 and we affirm[5].

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[4] McKenzie also appeals: (1) the district court's refusal to enter judgment on the emotional distress and punitive damages awarded her by the jury on the FLSA claim; (2) the reduction of her FLSA back pay award; and (3) the denial of front pay. However, we need not reach those issues.

We hold that McKenzie did not engage in protected activity under § 215(a)(3) when, in her capacity as personnel director, she undertook to advise Renberg's that its wage and hour policies were in violation of the FLSA.

BACKGROUND

Renberg's, Inc. ("the company") hired McKenzie as a receptionist in July 1984. She was promoted to Assistant Personnel Director in October 1984, and in May 1985, she became the company's Personnel Director. As Personnel Director, McKenzie was responsible for monitoring compliance with state and federal equal employment opportunity laws, wage and hour laws, and other laws regulating the workplace.

In August 1991, a co-worker of McKenzie, Marsha McElroy, attended a seminar on wage and hour laws and returned with various informational materials. McElroy gave these materials to McKenzie, who, after reviewing them, became concerned that certain employees of the company were not receiving proper compensation for working overtime. McKenzie discussed the matter with McElroy, and then decided to disclose her concerns to the company attorney, Steve Andrew. McKenzie and McElroy met with Andrew on September 4, 1991, and later that same day, McKenzie also discussed the wage and hour problem with Robert Renberg

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[5] The Court also has before it the defendants' motion for sanctions. We have considered the arguments therein and hereby deny the motion.

("Renberg"), the company president. Sixteen days later, on September 20, 1991, McKenzie was terminated by Renberg.

Believing she had been retaliated against for reporting the company's possible wage and hour violations, McKenzie filed suit in the United States District Court. In her complaint, McKenzie asserted an FLSA retaliatory discharge claim under 29 U.S.C. § 215(a)(3). This statutory provision makes it unlawful for an employer to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

29 U.S.C. § 215(a)(3).

McKenzie also asserted a state law claim for wrongful discharge in violation of Oklahoma public policy, see Burk v. K-Mart Corp., 770 P.2d 24 (Okla. 1989)[6]

The district court dismissed the Burk public policy claim under Fed. R. Civ. P. 12(b)(6). The FLSA retaliation claim was tried to the jury.

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[6] McKenzie also brought a state law claim for intentional infliction of emotional distress and a federal claim of sex discrimination under Title VII. The emotional distress claim was dismissed prior to trial in an order from which McKenzie does not appeal. McKenzie's Title VII claim apparently was abandoned prior to trial (see District Court's Pretrial Order, Aplt. App. at 1-2) and therefore we do not address it in this appeal.

The parties vigorously disputed the facts at trial. McKenzie testified that the defendants were not very open to her concerns about the company's possible FLSA violations. According to McKenzie's testimony, Andrew seemed not to understand her concerns and would not examine the seminar materials she had brought to the September 4, 1991 meeting. McKenzie testified that at one point in the meeting, Andrew drew a line on a legal pad--apparently representing the symbolic line between "right" and "wrong"--and indicated to McKenzie that he was not afraid to cross that line. After the meeting with Andrew, McKenzie spoke with Renberg. McKenzie testified that Renberg also seemed indifferent to the wage and hour problem. She had the impression that Renberg had already spoken to Andrew about the FLSA issue. McKenzie testified that after these meetings she began to feel uneasy and feared for her job.

McKenzie testified that her uneasiness continued during the next few weeks, as Andrew would not return her repeated phone calls. On September 20, 1991, Renberg came to McKenzie's office and fired her. McKenzie testified that Renberg's only stated reason for firing her was his "loss of confidence" in her. McKenzie later discovered that she had been under investigation by an internal security officer since September 12, 1991, eight days after she first reported the FLSA violations to Andrew. Renberg testified that he had personally requested the investigation of McKenzie, and that McKenzie was the only employee he specifically remembered ever having asked to be investigated. Finally, McKenzie testified that she had received no warnings or complaints from

the defendants about her performance, despite a general company policy that required progressive counseling about performance problems before termination.

The defendants disputed much of McKenzie's testimony at trial. Andrew testified that the company did not have a progressive discipline system in place, nor did it have an employee's manual at the time of McKenzie's discharge. In addition, the defendants sought to rebut McKenzie's claim of retaliation by offering evidence that Marsha McElroy, who attended the FLSA seminar and who also raised the possible FLSA violations with Andrew, was not terminated.

Renberg denied that McKenzie's discharge was in retaliation for her protected FLSA activity. Renberg testified that he fired McKenzie for two legitimate reasons:

(1) for disclosing confidential information in her role as personnel director[7]; and,

(2) for notarizing a "contract" between two company employees for sexual favors.

The "contract," which was entered into by Brenda Jagels, an on-call sales clerk, and David Childers, a company vice-president, provided in relevant part as follows:

AREA OF CONTENTION: **Renberg's Christmas Bonus**

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[7] The alleged breaches of confidentiality involved McKenzie disclosing the names of company employees suspected of criminal activity and divulging the impending demotion of a department manager.

TERMS OF THE AGREEMENT: Should Christmas bonuses not be paid in their usual manner to the employees of Renberg's Inc., a company operating in Tulsa, Oklahoma, then David Childers will provide Brenda Jagels with the following:

(1) Fendi Parfum 1.4 oz.
(1) Fendi EDT
(1) Fendi Body Lotion or Creme
(1) Erno Laszlo Eye Creme

However, should Christmas bonuses be paid then Brenda Jagels will provide David Childers with a very special and provocatively intimate evening; time, place and duration to be negotiated.

PAYMENT: Made on or before December 25, 1989.

Brenda, this letter is intended to be a binding contract. Please signify your agreement with the foregoing provisions by signing below and returning one copy for my file.

At trial, McKenzie admitted that she had notarized the sex contract, but stated that she had neither read it nor was aware of its content when she notarized it. McKenzie also admitted that she had made a mistake by notarizing the contract.

The trial was conducted in three stages, with the question of FLSA liability decided first, followed by the jury's

determination of back pay and compensatory damages, and finally, of punitive damages. After the liability phase, the jury concluded that the defendants' asserted non-retaliatory reasons for discharging McKenzie were pretextual and returned a special interrogatory finding that McKenzie was terminated in retaliation for reporting her belief that Renberg's was in violation of the Fair Labor Standards Act. After the two damages phases of the trial, the jury returned verdicts awarding McKenzie $100,000 in back pay, $175,000 in emotional distress damages, and $50,000 in punitive damages. The district court deferred entry of judgment on the jury's verdict and ordered further briefing from the parties on the question whether emotional distress and punitive damages were authorized under the FLSA. On July 15, 1994, the district court issued its findings of fact and conclusions of law, pursuant to which the court: (1) reduced McKenzie's back pay award to $50,983.04; (2) granted McKenzie an additional equal amount of $50,983.04 as liquidated damages; (3) denied McKenzie's request for front pay under the equitable doctrine of "unclean hands"; and (4) (apparently) ruled that emotional distress and punitive damages were not available under the FLSA as a matter of law.

After the district court entered a corresponding judgment in favor of McKenzie, the defendants filed a Motion for Judgment as a Matter of Law under Fed. R. Civ. P. 50, or in the alternative, a Motion for New Trial under Fed. R. Civ. P. 59. The district court granted the Motion for Judgment as a Matter of Law, and ruled that the Motion for New Trial was moot. McKenzie now appeals.

DISCUSSION

I. Motion for Judgment as a Matter of Law

McKenzie first challenges the district court's decision to grant the defendants judgment as a matter of law on her FLSA retaliation claim. We review de novo the grant or denial of a motion for judgment as a matter of law, applying the same legal standard as the district court. Clark v. R.E.L. Prods., Inc., 972 F.2d 317, 317 (10th Cir. 1992). In conducting this review, we must determine whether, "'viewing the evidence in the light most favorable to the nonmoving party, the evidence and the inferences to be drawn from it are so clear that reasonable minds could not differ on the conclusion.'" Pytlik v. Professional Resources, Ltd., 887 F.2d 1371, 1380 (10th Cir. 1989) (quoting Guilfoyle v. Missouri, Kansas & Texas R.R. Co., 812 F.2d 1290, 1292 (10th Cir. 1987)). Judgment as a matter of law may be granted under Fed. R. Civ. P. 50 "only if the evidence points but one way and is susceptible to no reasonable inferences supporting the party opposing the motion." FDIC v. United Pac. Ins. Co., 20 F.3d 1070, 1079 (10th Cir. 1994). Applying this standard, we affirm the judgment of the district court, although we do so on a different ground than that relied upon below.

A.

The Tenth Circuit applies a "motivating factor" analysis to claims of retaliatory discharge under § 215(a)(3) of the FLSA: "When the 'immediate cause or motivating factor of a discharge

is the employee's assertion of statutory rights, the discharge is discriminatory under § 215(a)(3) whether or not other grounds for discharge exist.' If retaliation is not the motivating factor, then the discharge is not unlawful." Marx v. Schnuck Markets, Inc., 76 F.3d 324, 329 (10th Cir.) (quoting Martin v. Gingerbread House, Inc., 977 F.2d 1405, 1408 (10th Cir. 1992)), cert. denied, 116 S. Ct. 2552 (1996). The motivating factor test is equivalent to a "but for" inquiry--a discharge is unlawful under § 215(a)(3) "only if it would not have occurred but for the retaliatory intent." Martin, 977 F.2d at 1408 n.4.

We believe the jury verdict rendered in this case is dispositive of the retaliation issue. At trial, the jury was presented with McKenzie's evidence of retaliation, as well as the defendants' evidence regarding their asserted non-retaliatory reasons for the discharge. The trial judge correctly instructed the jury that McKenzie bore the burden of proving that her FLSA activity was the "motivating factor" in the termination decision and that she would not have been discharged "but for" the defendants' retaliatory intent. See Martin, 977 F.2d at 1408 & n.4. In this regard, the jury was told that if it found McKenzie would have been terminated regardless of her FLSA activity, then it was required to find in favor of the defendants. See Reich v. Davis, 50 F.3d 962, 966 (11th Cir. 1995) (holding that under the "but for" test, a retaliation Plaintiff cannot prevail if she "would have suffered exactly the same adverse action even if [she] had not engaged in FLSA activities"). After being given these instructions, the jury returned a special interrogatory finding that McKenzie was terminated because of her FLSA activity. The jury therefore rejected the defendants' asserted non-retaliatory reasons and found that unlawful

retaliation was the "but for" cause of McKenzie's discharge[8]

Despite the jury's express finding of retaliatory intent, the district court granted the defendants' motion for judgment as a matter of law. The district court reasoned that because the defendants would have been justified in discharging McKenzie for notarizing the sex contract, they could not be held liable under the FLSA even if they had unlawfully retaliated against McKenzie. In the district court's view, the sex contract provided an independent lawful justification for McKenzie's discharge which trumped any retaliatory motive on the defendants' part:

> [W]hen all of the evidence is viewed in a light favorable to Plaintiff, and all reasonable inferences are granted thereto, the evidence is sufficient to submit the issue to the trier of fact. . . . However, the evidence regarding Plaintiff's participation in the written quid pro quo contract for sexual favors presents a different matter. If this nonpretextual

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[8] In its Findings of Fact and Conclusions of Law, the district court acknowledged the jury's rejection of the defendants' asserted non-retaliatory reasons:

> The jury found that the Plaintiff was willfully and intentionally retaliated against and terminated by Defendants on September 20, 1991, because she had communicated good faith concerns regarding possible FLSA violations by Renberg's, Inc. The jury concluded Defendants' proffered reasons for Plaintiff's termination were pretextual.

Aplt. App. at 27-28 (emphasis added).

> reason standing alone would support employment termination, a judgment as a matter of law is appropriate even though a factual issue exists regarding alleged retaliation pursuant to 29 U.S.C. § 215(a)(3).

(Aplt. App. at 37-38.)

Under the district court's approach, the dispositive question is whether the defendants would have been justified in terminating McKenzie for notarizing the sex contract. This approach, however, disregards both the jury's express findings of fact and the "but for" test of causation. Under the "but for" standard, only those employees "who would have suffered exactly the same adverse action even if they had not engaged in FLSA activities will be unprotected. . . ." Davis, 50 F.3d at 966 (emphasis added). Thus, the mere existence of a non-retaliatory motive that would justify an employee's discharge does not absolve an employer of liability for a retaliatory employment decision; rather, the employer must actually rely on that non-retaliatory reason as the sufficient, motivating reason for the employment decision. As the Supreme Court recently stated, "proving that the same decision would have been justified . . . is not the same as proving that the same decision would have been made." McKennon v. Nashville Banner Pub. Co., 115 S. Ct. 879, 885 (1995) (omission in original) (quotation omitted). In other words, an employer may not prevail "by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision." Price Waterhouse v. Hopkins, 490 U.S. 228, 252 (1989) (plurality opinion) (involving a mixed-motive situation). Here, the defendants were given the opportunity at trial to

persuade the jury that McKenzie was terminated not for reporting her wage and hour concerns, but for notarizing the sex contract. The jury, however, was not convinced. The jury instead found that the "but for" cause of McKenzie's discharge was her FLSA activity, and that the defendant's asserted "sex contract" rationale was a pretext. Given these findings of fact, it is immaterial whether the defendants would have been justified in discharging McKenzie for notarizing the sex contract, as the jury concluded she was not actually discharged for this reason.

B.

The district court erred in another important respect as well. At trial, McKenzie argued that Renberg was not aware of the existence of the sex contract until after he terminated her, and thus could not have relied on the contract in making his decision. To support her argument, McKenzie offered into evidence a copy of the sex contract with a handwritten date of "10/7/91" in the upper right-hand corner--a date approximately three weeks after McKenzie was terminated. Renberg, on the other hand, testified that a copy of the document was discovered and turned over to him sometime prior to McKenzie's termination .

The district court avoided this potential factual

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[9] In his deposition, Renberg testified that he first was given a copy of the sex contract sometime between March and September of 1991. At trial, however, Renberg testified that he first saw the document just a few days before he fired McKenzie.

complication by invoking the so-called "Summers doctrine." See generally Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700, 708 (10th Cir. 1988) (holding that an employer may avoid liability for a discriminatory discharge if, subsequent to the employee's discharge, the employer discovers evidence of wrongdoing that would have led to the employee's termination on lawful and legitimate grounds). In ruling on the defendants' motion for judgment as a matter of law, the district court applied Summers and reasoned that even if Renberg did not learn of the sex contract until after McKenzie's discharge, defendants nevertheless could rely on the sex contract to justify their termination decision.

While the district court's reasoning may have been consistent with our precedents at the time, the Summers doctrine has since been rejected. Shortly after the district court's decision in this case, the Supreme Court decided McKennon v. Nashville Banner Pub. Co., 115 S. Ct. 879 (1995). In McKennon, the Court specifically disapproved of our decision in Summers and held that an employer's after-acquired evidence of misconduct cannot operate to bar an employee's discrimination action. See 115 S. Ct. at 885 ("The employer could not have been motivated by knowledge it did not have and it cannot now claim that the employee was fired for the nondiscriminatory reason."). Thus, the district court's reliance on Summers was in error.

C.

Notwithstanding the district court's errors, defendants urge us to affirm the judgment on two grounds not relied upon

below. "An appellee may defend the judgment won below on any ground supported by the record." In re Robinson, 921 F.2d 252, 253 (10th Cir. 1990); see also United States v. Sandoval, 29 F.3d 537, 542 n.6 (10th Cir. 1994) (appellate court may "'affirm a district court decision on any grounds for which there is a record sufficient to permit conclusions of law, even grounds not relied upon by the district court'") (quoting Medina v. City and County of Denver, 960 F.2d 1493, 1495 n.1 (10th Cir. 1992)). Defendants argue that judgment as a matter of law was properly granted in their favor because: (1) McKenzie's conduct was not protected activity under § 215(a)(3); and (2) McKenzie failed to present sufficient evidence at trial to support the jury's finding of retaliation. Because we agree with the first of these propositions, we need not reach the second.

Defendants argue that McKenzie's act of reporting her good faith concerns about the company's possible wage and hour violations was not sufficient to trigger the protections of § 215(a)(3) .

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[10] The instruction to the jury on protected activity included the following statement: "The parties have stipulated that Plaintiff complained about practices she in good faith believed may have been unlawful under the Fair Labor Standards Act. The parties herein agree that good faith reporting or communicating concerns regarding possible FLSA violations is protected activity." (Jt. 2d Supp. App., Tab A.) While this "stipulation" would appear to preclude defendants' from arguing on appeal that McKenzie did not engage in protected activity, it is apparent from the colloquy between defense counsel and the trial judge that defendants neither agreed to this instruction nor entered into such a stipulation. Indeed, defendants repeatedly objected to the form of the protected activity instruction, and although the court overruled their objections, it did acknowledge on several

According to defendants, McKenzie was not asserting any rights under the FLSA but rather was merely performing her everyday duties as personnel director for the company. Section 215(a)(3) makes it unlawful for an employer to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

29 U.S.C. § 215(a)(3).

Although this provision specifically lists the types of activities which are protected from retaliation, we have held that § 215(a)(3) also protects employees who articulate a good faith, though unproven, belief that the employer is violating their rights under the FLSA. Love v. RE/MAX of Am., Inc., 738 F.2d 383, 387 (10th Cir. 1984). We also have held that § 215(a)(3) "applies to the unofficial assertion of rights through complaints at work." Id.

Despite our expansive interpretation of § 215(a)(3), we

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occasions that the issue was preserved for appeal. See, e.g., Jt. 2d Supp. App. at 510 ("[U]nderstanding you're very much interested in preserving that point for purposes of the beyond here, that is for appellate purposes—and I understand that, and you've raised it . . . ."); id. at 511 ("[C]an't we stipulate under the theory that I'm submitting it to the jury, certainly preserving your right to say, Judge, you're wrong . . . ."); id. at 512 ("[G]iving you the right to preserve your objection . . . . and certainly preserving your right to keep your issue for purposes of appeal alive . . . ."). In light of these statements, we do not deem the argument waived.

have never held that an employee is insulated from retaliation for participating in activities which are neither adverse to the company nor supportive of adverse rights under the statute which are asserted against the company. Indeed, the contrary conclusion follows directly from our decision in Love, where we held that in order to be protected under § 215(a)(3), an employee need not file an official complaint or institute an FLSA proceeding, so long as the employee makes a "good faith assertion of [one's] statutory rights." 738 F.2d at 387 (emphasis added); see also EEOC v. Romeo Community Schs., 976 F.2d 985, 989 (6th Cir. 1992) (per curiam) ("The Love Court held that it is the assertion of statutory rights that is the triggering factor, not the filing of a formal complaint. This view is in accord with other circuits.") (collecting cases). Thus, it is the assertion of statutory rights (i.e., the advocacy of rights) by taking some action adverse to the company--whether via formal complaint, providing testimony in an FLSA proceeding, complaining to superiors about inadequate pay, or otherwise--that is the hallmark of protected activity under § 215(a)(3).

Here, McKenzie never crossed the line from being an employee merely performing her job as personnel director to an employee lodging a personal complaint about the wage and hour practices of her employer and asserting a right adverse to the company. McKenzie did not initiate a FLSA claim against the company on her own behalf or on behalf of anyone else. Rather, in her capacity as personnel manager, she informed the company that it was at risk of claims that might be instituted by others as a result of its alleged FLSA violations. In order to engage in protected activity under § 215(a)(3), the employee

must step outside his or her role of representing the company and either file (or threaten to file) an action adverse to the employer, actively assist other employees in asserting FLSA rights ,

or otherwise engage in activities that reasonably could be perceived as directed towards the assertion of rights protected by the FLSA. Here, McKenzie did none of these things. Indeed, McKenzie testified that her job responsibilities included participating in wage and hour issues. There is no evidence in the record to suggest that McKenzie was asserting any rights under the FLSA or that she took any action adverse to the company; rather, the record reflects that McKenzie's actions in connection with the overtime pay issue were

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[11] The Tenth Circuit has not addressed whether § 215(a)(3) protects actions taken by an employee on behalf of other employees. In Title VII cases, the "opposition" clause contained in that statute's antiretaliation provision, 42 U.S.C. § 2000e-3(a), protects conduct by an employee who is not the direct victim of a practice made unlawful under Title VII, but who "opposes" such discrimination against others. Sumner v. United States Postal Serv., 899 F.2d 203, 209 (2d Cir. 1990); see, e.g., Eichman v. Indiana State Univ. Bd. of Trustees, 597 F.2d 1104, 1107 (7th Cir. 1979) (protecting a man who assisted a female co-worker in asserting her right to be free from sex discrimination); Jones v. Lynn, 669 F. Supp. 1108, 1121 (D.D.C. 1986) (same). While the FLSA contains no similar "opposition" clause, we assume, without deciding, that the language of § 215(a)(3) is sufficiently broad to encompass conduct taken on behalf of others. See, e.g., 29 U.S.C. § 215(a)(3) (making it unlawful for an employer to retaliate against an employee "because such employee has filed any complaint or instituted or cause to be instituted any proceeding under [the FLSA], or has testified or is about to testify in any such proceeding . . . .") (emphasis added). Section 215(a)(3) does not explicitly require that the employee's protected conduct relate to the assertion of his or her own statutory rights.

completely consistent with her duties as personnel director for the company to evaluate wage and hour issues and to assist the company in complying with its obligations under the FLSA. McKenzie therefore lacks an essential ingredient of a retaliation claim; that is, she did not take a position adverse to her employer or assert any rights under the FLSA. Accordingly, McKenzie did not engage in activity protected under § 215(a)(3), and we affirm the judgment as a matter of law in favor of the defendants on this alternative ground. Because this ruling disposes of McKenzie's FLSA retaliation claim, we need not address McKenzie's arguments regarding front pay, back pay, or emotional distress and punitive damages: As McKenzie's liability claim fails, so must her claims for legal and equitable relief.

B. Dismissal of McKenzie's State Law Wrongful Discharge Claim

McKenzie next argues that the district court erred in dismissing, for failure to state a claim, her state law tort claim for discharge in violation of Oklahoma public policy. We review de novo the district court's grant of a motion under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. Roman v. Cessna Aircraft Co., 55 F.3d 542, 543 (10th Cir. 1995).

McKenzie's state law claim is predicated upon Burk v. K-Mart Corp., 770 P.2d 24 (Okla. 1989). In Burk, the Oklahoma Supreme Court carved out a narrow exception to the Oklahoma employment-at-will doctrine by recognizing a tort cause of action "where an employee is discharged for refusing to act in violation of an established and well-defined public policy or for

performing an act consistent with a clear and compelling public policy." 770 P.2d at 29. McKenzie alleges that she was discharged for reporting her concerns that the company was not properly paying overtime pay to sales associates and department managers.

Assuming this allegation is true [12], McKenzie can prevail on her Burk claim only if she can show that Oklahoma has a clearly established public policy regarding maximum work hours and overtime pay.

McKenzie has not pointed us to any specific Oklahoma statute establishing a public policy of this sort. Moreover, we find no Oklahoma constitutional, statutory or decisional law which would require an employer such as Renberg's, Inc. to pay overtime compensation to its employees. The absence of any Oklahoma law on this subject is underscored by the fact that although the Oklahoma legislature has adopted the federal standards for minimum wages, see Okla. Stat. tit. 40 § 197.2 (making it unlawful for an employer in Oklahoma to "pay any employee a wage of less than the current federal minimum wage for all hours worked"), it has not adopted the FLSA standards governing maximum hours and overtime, see 29 U.S.C. § 207.

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[12] Because we are reviewing the sufficiency of the complaint, we must accept all well-pleaded allegations in the complaint as true and construe the allegations in the light most favorable to McKenzie. Doyle v. Oklahoma Bar Ass'n, 998 F.2d 1559, 1566 (10th Cir. 1993). Thus, we assume that McKenzie was retaliated against for reporting her good faith belief that Renberg's was violating the FLSA overtime provisions.

We also reject McKenzie's argument that the comprehensive Oklahoma statutory scheme governing the employer/employee relationship establishes a clear and compelling public policy mandating the payment of overtime compensation. Of the entire body of Oklahoma statutory law governing the employment relationship, McKenzie directs our attention to only one specific provision mentioning overtime pay, Okla. Stat. tit. 40 § 165.1. Section 165.1 is the definitions section of the Oklahoma Protection of Labor Act and defines the term "wages" as "compensation owed by an employer for labor or services rendered, including salaries, commissions, holiday and vacation pay, overtime pay, severance or dismissal pay, bonuses and other similar advantages agreed upon between the employer and the employee . . . ." Okla. Stat. tit. 40 § 165.1(4) (emphasis added). In light of the Burk court's admonition that the public policy exception be "tightly circumscribed" and reserved for violations of "established and well-defined public policy," 770 P.2d at 29, we believe section 165.1(4)'s passing reference to "overtime pay" is far too slender a reed upon which to base a public policy tort. Although it mentions overtime pay, section 165.1(4) does not prescribe a limit for maximum working hours, nor does it set forth a specific formula for calculating overtime pay .

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[13] Indeed, in those particular situations where the Oklahoma Legislature has mandated the payment of overtime to employees, it has provided the amount by statute. See, e.g., Okla. Stat. tit. 40 § 196.3(A) (requiring "all workmen employed by or on behalf of any public body engaged in the construction of public works" to be paid "not less than the prevailing hourly rate of wages for legal holiday and overtime work") (emphasis added). Section 196.2(3) of the statute defines the "prevailing hourly rate of wages" as "the wages and fringe benefits determined to be prevailing by the United

The absence of any clearly articulated overtime pay policy in the Oklahoma statutory scheme suggests that the Oklahoma courts would not entertain a Burk claim founded upon a discharge for reporting an employer's failure to pay overtime.

Despite the lack of a well-defined state policy, McKenzie argues that her Burk claim is cognizable because it is predicated upon a public policy found in a combined regime of both state and federal law. McKenzie relies on two cases of the Oklahoma Supreme Court to support this argument, Tate v. Browning-Ferris, Inc., 833 P.2d 1218 (Okla. 1992), and Todd v. Frank's Tong Serv., Inc., 784 P.2d 47 (Okla. 1989). In Tate, the court held that a Plaintiff who alleged a discriminatory discharge in violation of the Oklahoma and federal antidiscrimination statutes stated a claim under Burk. 833 P.2d at 1222-25. In Todd, the court upheld a Burk claim where the Plaintiff alleged that he had been discharged for refusing to operate a vehicle that did not comply with both state and federal safety regulations. 784 P.2d at 50.

We believe Tate and Todd are distinguishable from the case at bar. Unlike the present case, the alleged wrongful discharges in both Tate and Todd not only violated applicable federal law, but they also violated a mandate of state public policy clearly expressed in the Oklahoma statutes. In Tate, for instance, the Plaintiff alleged he had been fired because of his race--an action contrary to both the federal policy expressed in Title VII, 42 U.S.C. § 2000e et seq., and the state policy expressed in the Oklahoma antidiscrimination statute, Okla.

States Department of Labor pursuant to [federal law]."

Stat. tit. 25 § 1101 et seq. Similarly, in Todd, the Plaintiff alleged he was unlawfully discharged for refusing to operate an unsafe vehicle in violation of the federal Surface Transportation Assistance Act, 49 U.S.C. App. § 2305 (recodified at 49 U.S.C. § 31105(a)), and for refusing to operate a vehicle that was not in compliance with state safety regulations, Okla. Stat. tit. 47 §§ 12-201, 12-301. Here, by contrast, McKenzie cannot direct our attention to any specific Oklahoma policy or statute mandating the payment of overtime compensation to private employees. The most she can do is allege a violation of the federal FLSA. We therefore affirm the dismissal of McKenzie's Burk public policy claim .

CONCLUSION

For the foregoing reasons, the judgment of the district court is **AFFIRMED**.

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[14] Defendants alternatively argue that the FLSA preempts any state law tort claim based on an employer's retaliation against an employee for making an FLSA complaint. However, because McKenzie has not even asserted a violation of Oklahoma public policy cognizable under Burk, we need not reach the constitutional issue of preemption. See Ashwander v. TVA, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring) (noting well-established rule that federal courts should avoid deciding constitutional issues if narrower grounds for decision exist).

APPENDIX C - ORDER OF THE TENTH CIRCUIT COURT OF APPEALS DENYING REHEARING DATED OCTOBER 22, 1996

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 94-5197

LORI G. McKENZIE,
Plaintiff - Appellant,

v.

RENBERG'S, INC., and ROBERT L. RENBERG,
Defendants - Appellees.

ORDER
Entered October 22, 1996

Before SEYMOUR, Chief Judge, TACHA, and EBEL, Circuit Judges.

This matter comes one for consideration of appellant's petition for rehearing.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

The motion of Society for Human Resource Management to file an amicus brief in support of appellant's petition for rehearing is granted.

Entered for the Court

PATRICK FISHER, Clerk

By:/s/
Trish Carara
Deputy Clerk

APPENDIX D - 29 U.S.C. §203(a)

§ 203. Definitions

"As used in this chapter--

* * *

(a) 'Person' means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons."

APPENDIX E - U.S.C. §203(d)

§ 203. Definitions

"As used in this chapter---

* * *

(d) 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization."

APPENDIX F - 29 U.S.C. §216(a)

§ 216. Penalties; civil and criminal liability; injunction proceedings terminating right of action; waiver of claims; actions by Secretary to Labor; limitation of action; savings provision

"(a) Any person who willfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection."

APPENDIX G - 29 U.S.C. §216(b)

§ 216. Penalties; civil and criminal liability; injunction proceedings terminating right of action; waiver of claims; actions by Secretary of Labor; limitation of actions; savings provision

"(b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees similarly situated. No employee shall be a party Plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the Plaintiff, or Plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party Plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection."

MAR 18 1997
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No. 96-1293

In The

Supreme Court of the United States

October Term, 1996

LORI G. McKENZIE,

Petitioner,

vs.

RENBERG'S INC., and ROBERT L. RENBERG,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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LIST OF INTERESTED PARTIES

The Petitioner is Lori G. McKenzie.

The Respondents are correctly identified in the Petition for Writ of Certiorari. The Respondents are: Renberg's, Inc. and Robert L. Renberg, President of Renberg's, Inc.

Both of the Respondents join in this brief in opposition.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents request that the Court deny the Petition for Writ of Certiorari seeking review of an Opinion of the Court of Appeals for the Tenth Circuit reported at 94 F.3d 1478 (10th Cir. 1996). All references to the trial transcript are contained in the Appendices filed with the Tenth Circuit Court of Appeals.

STATEMENT OF JURISDICTION

Petitioner raises no justification for review by this Court as set forth in Rule 10 of the Rules of the Supreme Court. There is no conflict among the circuits, nor has Petitioner pointed to any failure of the Tenth Circuit Court of Appeals to follow existing law. Further, there is no compelling question of federal law. The decision below merely applied existing concepts of protected activity to a particular factual setting. As noted in the rules, generally a petition for writ of certiorari will not be granted for review of alleged erroneous factual findings or an asserted misapplication of a properly stated rule of law. It is within this last area that Petitioner bases her request for certiorari and the Petition should be denied on this basis alone.

STATEMENT OF THE CASE

Respondents respectfully oppose the Petition for Writ of Certiorari. For the most part, Petitioner seeks creation of new legal standards and the rejection of long standing

law defining protected activity under 29 U.S.C. § 215(a)(3). Petitioner seeks special protected status for a corporate executive who has as part of his or her responsibilities the monitoring of a company's activities for compliance with a state or federal law. Petitioner attempts to gain the attention of the Court with the wording of her Question Presented. In that "question," Petitioner states that she had a good faith belief that the Respondent company was violating the Fair Labor Standards Act ("FLSA") and so informed the company's attorney. As will be pointed out below, the question misrepresents the factual scenario in this case upon which the Tenth Circuit rendered its opinion.

A. Course of Proceedings and Disposition of Case Below.

Petitioner filed her action in the United States District Court for the Northern District of Oklahoma claiming that her discharge was wrongful under 29 U.S.C. § 215(a)(3) as well as being wrongful under several state laws and a claim of wrongful discharge under ERISA. Petitioner dismissed her ERISA claim prior to trial, and the district court dismissed her supplemental state law claims. The case was tried to a jury which rendered a verdict for the Petitioner including back pay, emotional distress and punitive damages. Respondents filed a motion for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50, or in the alternative, a motion for new trial under Federal Rule of Civil Procedure 59. The district court granted Respondents' motion for judgment as a matter of law. The Tenth Circuit

Court of Appeals affirmed the dismissal holding that Petitioner had not engaged in any protected activity under 29 U.S.C. § 215(a)(3) because she had never engaged in any activity adverse to her employer or asserted rights under the FLSA. The Tenth Circuit also affirmed dismissal of her state law claims, but those claims are not a part of this Petition for Certiorari.

B. Correction of Misstatements in the Petition Pursuant to U.S. Supreme Court Rule 15.2.

Respondents bring the following misstatements to the Court's attention:

1. Petitioner misrepresents that she had a good faith belief that Renberg's, Inc. was violating the FLSA and reported that violation to the company's attorney and/or Robert Renberg. This assertion is set forth in the Question Presented and at pages 6, 15 and 23 of the Petition. Quite to the contrary, Petitioner testified at trial that she went to the company attorney not to report a violation, but merely to ask him for his professional opinion as to whether there was a wage and hour problem. (Trial Trans., p. 453, L. 10 - p. 454, L. 19). In fact, Petitioner testified that she was not even going to address the issue with her employer unless the attorney told her there was a problem. (Trial Trans., p. 455, L. 20 - p. 456, L. 19). Thus, while Petitioner may have reviewed company records prior to seeing the attorney, she never asserted to Respondents that they were in any way violating the law.

2. Petitioner claims at page 5 of her Petition that she discussed her concerns with Renberg's president, Robert Renberg. However, Petitioner testified at trial that she

never explained her concerns to Mr. Renberg. (Trial Trans., p. 457, LL. 2-7). In fact, she testified that all she told Mr. Renberg was that she was waiting to hear from the attorney. (Trial Trans., p. 349, LL. 6-13).

3. Petitioner claims at page 5 that she became fearful for her job. Positioning of this statement would imply that her fear related to talking to the attorney and/or Mr. Renberg. However, Petitioner testified at trial that her "fear" was that she had incorrectly monitored Renberg's pay practices, i.e., she had not properly done her job. (Trial Trans., p. 347, LL. 16-18).

4. At page 6 of the Petition, she states that she became the subject of an investigation. Petitioner fails to relate to the Court that the investigation related to complaints that Petitioner, as personnel manager, had on numerous occasions, breached the confidentiality of personnel matters and that she had disclosed information in confidential employee interviews and had become a general gossip regarding personnel matters. Petitioner also fails to note that Respondents discovered that she, as a personnel manager, had notarized a sex contract.[1] The contract provided that if the subject female sales associate received a Christmas bonus, she would give the company's male vice president "a very special and provocative intimate evening", i.e., sex. The Respondents naturally found that was outrageous conduct for a personnel manager.

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[1] The terms of that agreement are set forth in full at page 25a of the Petitioner's Appendix.

REASONS FOR DENYING THE WRIT

I.

THE FAIR LABOR STANDARDS ACT REQUIRES THAT AN EMPLOYEE ENGAGE IN ACTION IN OPPOSITION TO THE EMPLOYER.

Any anti-retaliation provisions of the various federal laws protect two basic types of activities: opposition and participation. See Clark Boardman Callaghan, *Employment Discrimination Coordinator*, ¶¶ 20,901 and 20,920. In this case, Petitioner asserts that she opposed certain practices. However, the record is clear that Petitioner did not oppose anything. Rather, she testified that she simply presented questions to the company's attorney as she was required to do by her employer. (Trial Trans. p. 455, LL. 2-10; p. 479, LL. 7-15; pp. 722-724). To constitute protected activity, the employee must actually oppose something. *Booker v. Brown and Williamson Tobacco Co., Inc.*, 879 F.2d 1304, 1312 (6th Cir. 1989). This holding is common sense since it follows the ordinary meaning of "opposition":

> Act of opposing or resisting; antagonism; state of being opposite or opposed; antithesis. Also a position confronting another or placing in contrast; that which is or furnishes an obstacle to some result . . .

Black's Law Dictionary, Sixth Edition 1990.

> 1. the action of opposing, resisting or combating; 2. antagonism or hostility; 3. a person or group of people opposing, criticizing, or protesting something, someone, or another group . . . ; 6. the act of opposing, or the state of being opposed by way of offset, comparison, or contrast . . .

Random House Dictionary of the English Language, Random House, New York 1966.

The Tenth Circuit found that Petitioner's acts were not adverse to Renberg's, i.e., they were not in opposition to any of its practices and, thus, no protected activity occurred. Petitioner and the potential amicus attempt to expand the protection of § 215(a)(3) beyond its language and beyond any decision heretofore rendered. According to these parties, every human resource employee is engaged in protected activity as an ad hoc enforcement officer with the Department of Labor or any other governmental agency that has jurisdiction for a subject which falls within that employee's job description. However, 29 U.S.C. § 215(a)(3) provides:

> (a) . . . it shall be unlawful for any person
>
> . . .
>
> (3) To discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

Clearly, the language of § 215(a)(3) does not support this expansive theory of protected activity. Petitioner at page 17 of her Petition partially quotes 29 C.F.R. § 24.2(b)(3). She then asks this Court to take a giant leap of faith and agree without any authority or explanation

that the regulation describes Petitioner's conduct as protected activity. Petitioner omitted the portion of the regulation that connected the cited language to "proceedings" under the FLSA. Proceedings are acts in opposition.

Petitioner's reliance upon *Mitchell v. De Mario Jewelry, Inc.*, 361 U.S. 288, 292, 80 S.Ct. 332, 335, 4 L.Ed.2d 323 (1960), is misplaced. In *De Mario*, employees contacted the Department of Labor regarding unpaid wages. This Court held that going to the Department of Labor was a protected activity. Clearly, Petitioner never went to or indicated a desire to go to, or threatened to go to, the Department of Labor regarding any issue prior to her discharge; nor was there any evidence in the record to suggest that Respondents believed that she would engage in such activity. The Court in *De Mario* recognized that the activity being protected by § 215(a)(3) was opposition and participation. The Court clearly noted that the conduct protected by the statute related to presenting grievances and seeking vindication of rights. These activities are clearly those in opposition to the employer. *Id.*

None of the other cases cited by the Petitioner at pages 10-11 of her Petition supports her position. Even a cursory review of those cases discloses that the plaintiff in each case did something in opposition to the employer's interest. Rather than support Petitioner's argument, they support the Tenth Circuit's analysis.

The fallacy of Petitioner's position is that it ignores the reality of what happened when she and Marsha McElroy, the company comptroller and CPA, jointly presented questions about Renberg's pay system to the company's attorney. Both employees admitted at trial that

this was what their employer expected and encouraged them to do when questions arose. (Trial Trans. pp. 93-98; pp. 455, 479; pp. 722-724). Petitioner asserts seeking guidance, as requested by her employer, is protected activity and presumes that she was protesting the practices of Renberg's. As the Tenth Circuit found, the record was devoid of any evidence that Petitioner was protesting or opposing any practice of Renberg's.

This case does not involve a situation where a human resource person becomes involved in a disagreement with his or her employer which might arguably constitute protected opposition activity. A decision for that scenario must be reserved when such a case presents itself, but that is not the situation in this case.

II.

PERSONNEL DIRECTORS ARE NOT GIVEN SPECIAL STATUS UNDER 29 U.S.C. § 215(a)(3).

At pages 12-15 of the Petition for Writ of Certiorari, Petitioner argues that the FLSA endows her with a special status. Petitioner's argument supports the rationale of the Tenth Circuit. Petitioner correctly notes at page 14 that the Petitioner could be considered an "employer" under the FLSA for purposes of liability. It goes without citation of authority, that a corporation, i.e., the employer, can only act through its employees. When Petitioner reviewed materials on wage and hour and brought them to the company attorney at the request of the company, she was carrying out the acts of the employer. The Tenth Circuit correctly noted that she was acting on behalf of

the employer and never crossed the line of acting for herself or in a way not on behalf of her employer.

III.

PETITIONER'S ANALOGY TO OTHER PROTECTIVE LAWS IS FLAWED.

At page 16 of the Petition, Petitioner asserts that her activities qualify as protected activities. At page 17 in footnote 6, she cites the case of *Kansas Gas & Electric Company v. Brock*, 780 F.2d 1505 (10th Cir. 1985), *cert. denied*, 478 U.S. 1011 (1986), plus other cases. Petitioner's reliance upon *Brock* and the other cases decided pursuant to 42 U.S.C. § 5851 of the Energy Reorganization Act ("ERA") is misplaced. The ERA is a distinct law wherein special provisions exist. The cases cited by the Petitioner in this section involved, for the most part, the discharge of nuclear safety inspectors.

The operation of nuclear facilities is tightly controlled and regulated by the Nuclear Regulatory Commission ("NRC"). Nuclear safety inspectors are "watchdogs" for the public safety, and to that extent, the NRC requires a quality assurance program and that the facilities be inspected, tested and subject to comprehensive systems of planned and periodic audits to be carried out to verify compliance with all aspects of the quality assurance program. 10 C.F.R. § 50 Appendix B.

The NRC's regulations attempt to provide a wide safety net for reporting problems at nuclear facilities to protect the public from nuclear disasters. To this end, the NRC issued regulations implementing broad employee

protection, e.g., 10 C.F.R. § 50.7(a).[2] The NRC regulations included as protected activity an employee providing information to the employer about safety related problems. NRC regulations do not require that an employee be in an adverse position, or even be opposed to any practice of the facility operator to be engaged in protected activity. Obviously, the risk to the public is so high that the NRC concluded that any notice must be treated as protected activity.

The cases cited by Petitioner merely uphold the NRC's regulations and have no bearing on the FLSA. Such regulations, obviously, do not apply in this case. In nuclear facilities, the employer is placed on notice by regulation that any notice of safety issues is protected activity. It is not appropriate to attempt to stretch this unique regulatory requirement to other areas of the law. This unusual regulatory structure explains why Petitioner's cases for the most part are limited to those dealing with nuclear facilities. Although Petitioner cites a few other cases, as authority, the analysis below clearly shows they do not stand for the proposition cited.

At footnote 6 on page 17 of her Petition, Petitioner cites *Bechtel Construction Co. v. Secretary of Labor*, 50 F.3d 926 (11th Cir. 1995). In that case, which is also an NRC case, a construction worker, not a safety inspector or personnel director, disagreed with his employer over proper procedure for surveying and tagging contaminated tools. He additionally made a complaint to the

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[2] The NRC repeats this protective regulation in each subpart of its regulations beginning at 10 C.F.R. of which the above is an example.

senior health physics supervisor about the practice. *Id.* at 229-230. Even though this is an NRC case, it is a classic example of protected activity. The employee was asserting his rights and was opposing his employer's practice. Obviously, such a situation did not exist in this case.

Also at footnote 6 at page 17, Petitioner cites the case of *Pogue v. United States Department of Labor*, 940 F.2d 1287 (9th Cir. 1991). Again, this is not similar to the situation in this case, nor is the holding inconsistent with the Tenth Circuit's ruling in this case. *Pogue* also arose under the NRC's jurisdiction, the facts of the case demonstrate that the plaintiff was engaged in activities adverse to her employer. In addition to filing the routine safety reports, she filed a complaint with a shipyard commander that her supervisor was thwarting her inspection efforts. Subsequent to that complaint, several angry confrontations occurred between plaintiff and her supervisor. *Id.* at 1288. The parties did not dispute that the plaintiff engaged in protected activity. *Id.* at 1289. The case is an example of an employee engaging in activities adverse to her employer. Here, Petitioner engaged in no like activity. She never confronted her employer about any practice. She merely brought information to her company's attorney, which was her job. It was not Pogue's job to assert that her supervisor interfered with required reporting. It was not part of her job to get into angry confrontations with her supervisor.

At page 17 Petitioner cites *Passaic Valley Sewerage Commissioners v. United States Department of Labor*, 992 F.2d 474 (3d Cir. 1993). This is a whistleblower case under the Clean Water Act. This is not a case of an employee "just doing their job." The claimant who was the chief of

laboratory and stream pollution control, became highly critical of his plant sampling procedure. The gist of his complaint was that the system used was inordinately expensive, inefficient, scientifically unreliable and in violation of the Clean Water Act user charge provisions. He made a formal written complaint to his supervisor. A year later he repeated his complaints by writing to a higher management level. Still later he wrote to the director of the organization expressing his dissatisfaction. At that time, legal counsel reviewed his complaints and found them to be without merit. This did not stop the plaintiff. He began to discard water samples because he felt they were unreliable and in the ensuing weeks he prepared a memorandum specifically alleging Clean Water Act violations that he circulated to all the plant's commissioners. At the end of his campaign against the employer's practices at all levels from his immediate supervisor to the top of the organization, the plaintiff then threatened to report his claim directly to the EPA. This is a classic whistleblowing scenario. The employee was clearly acting adverse to the company's position, claiming a specific violation and threatening to report the violation to the supervisory governmental agency. That did not occur in this case.

Respondents have never claimed that internal complaints per se cannot constitute protected activity, and the Tenth Circuit decision does not hold otherwise. Rather, in this case, Petitioner was merely engaged in her daily activities. Nothing unusual occurred. She never did anything adverse to her employer. She was merely representing the company when engaged in reviewing the company overtime practices. Respondents know of no

case that would support Petitioner's theory that her actions constituted protected activity under the FLSA or any other similar statutory scheme. The Tenth Circuit decision reflects a reasoned and common sense approach and that decision should not be disturbed.

IV.

NO SPECIAL RULES ARE NECESSARY FOR PERSONNEL DIRECTORS.

At the core of Petitioner's argument is a request that the law treat personnel directors differently than other employees. As noted above, anti-retaliation laws protect opposition and participation. Petitioner asserts that she and others like her should be protected even though they engage in neither category of protected activity. Petitioner asserts that personnel directors and the like should be afforded a new category of protected activity. This position assumes the existence of universal facts rather than examining each case on its merits. Those assumed universal facts are: All employers do not want to comply with the law and that there is a natural animosity between personnel directors and the employer; and that the focus of a personnel director's job is to protect employees rather than assisting the company in complying with legal requirements. The Court simply cannot assume that such sweeping assumptions exist that transform ordinary duties into opposition activities.

Petitioner has protection as does any employee. If she had become adverse to her employer, then those facts

would have been reviewed to determine whether opposition activity occurred. This is simply a case-by-case analysis and one that has not been rejected by the decision of the Tenth Circuit. The decision in this case does not leave personnel directors without protection, it simply does not treat the subject matter of their job as protected activity.

As the courts have recognized, a personnel director is an executive of the employer and that person is not a police officer, but rather that person is an advisor to the employer. Such an executive represents the employer, not the employee. *EEOC v. Crown Zellerbach Corporation*, 720 F.2d 1008, 1013-1014 (9th Cir. 1983); *Pendleton v. Rumsfeld*, 628 F.2d 102, 108 (D.C. Cir. 1980).

In fact, Petitioner is similarly situated to any staff person. She advised her employer on issues within the scope of her responsibility, such as a comptroller would advise about taxes, a safety director would advise on OSHA matters, and other examples come easily to mind. If this Court were to depart from the opposition requirement of protected activity, it would radically change the law of retaliation by creating a dual standard. Rank and file employees would have to show they opposed some practice while white collar executives could merely claim that some subject matter within their job responsibilities transform the performing of their job into protected activity. The law has never recognized such a two-tier system, in fact, the courts have always recognized that such executives are in a relationship of loyalty and representation of the employer. Petitioner's argument would take the Court away from this longstanding precedent.

The Tenth Circuit's decision is not unlike the decisions in *Booker v. Brown* and *Williamson Tobacco, Inc.*, 879 F.2d 1304 (6th Cir. 1989) and *Aldridge v. Tougaloo College*, 847 F. Supp. 480 (S.D. Miss. 1994), wherein these courts dismissed the plaintiffs' retaliation claims because the alleged protected activity was so vague as to not put the employer on notice that the employee was opposing the employer. Here, Petitioner had a question about overtime, and proceeded to handle that in the way her employer had instructed her to handle it, i.e., see the attorney. In fact, Petitioner admitted that this particular issue of overtime was handled like all other previous wage and hour issues. (Trial Trans., p. 67, L. 24 - p. 68, L. 17). No one expressed any displeasure with her doing her job, or tried to discourage her from pursuing her question. (Trial Trans. p. 69, LL. 10-25).

How could the Respondents be placed on notice that Petitioner was engaged in protected activity? Like the vague assertion of a claim, there is no knowledge by the Respondents that the employee was engaged in protected activity. It defies logic that Respondent would give a job duty to an employee, provide the employee with the resources to carry out that duty, then retaliate against the employee for performing that job. Beyond the illogical position of the Petitioner, she presented no evidence to suggest that Respondents did not want her to do her job.

V.

THERE IS NO PUBLIC INTEREST THAT WILL BE SERVED BY ADOPTING A NEW STANDARD.

The Tenth Circuit applied recognized standards for determining whether Petitioner had engaged in protected activity under the FLSA. Petitioner cites no authority suggesting any departure from those standards is warranted.

Petitioner seeks special treatment, i.e., a right to a jury trial any time an employee's work involves administration of state or federal requirements. Her position necessitates a jury trial any time such an employee challenges their discharge regardless of whether the employee opposed or challenged any practice of the employer. The jury will be free to second guess the termination decision. The jury will be invited to replace the judgment of management. This approach is clearly contrary to established employment law wherein the trier of fact is not allowed to substitute its judgment for that of the employer. *Walker v. AT&T Technologies, Inc.*, 995 F.2d 846 (8th Cir. 1993); *Sanchez v. Phillip Morris, Inc.*, 992 F.2d 244, 247 (10th Cir. 1993); *Branson v. Price River Coal Co.*, 853 F.2d 768, 772 (10th Cir. 1988); *Elliot v. Group Medical and Surgical Service*, 714 F.2d 556, 567 (5th Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984); *Kephart v. Institute of Gas Technology*, 630 F.2d 1217, 1223 (7th Cir. 1980), *cert. denied*, 450 U.S. 959 (1981). Petitioner is not unprotected as claimed; rather, she has the same protection as any other person.

CONCLUSION

Petitioner fails to present any conflict among the circuits, or any compelling question of federal law for this Court to consider on her Petition for Writ of Certiorari. The Tenth Circuit merely applied existing law to the facts. The decision is consistent with existing law. The writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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No. 96-1293

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

LORI G. McKENZIE,

Petitioner,

vs.

RENBERGS INC., AND ROBERT L. RENBERG

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT'S *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

An employer fired its personnel manager because she reported, in good faith, to her superiors that they have deprived certain workers of overtime compensation due under the Fair Labor Standards Act. Is the employer immune from liability under the anti-retaliation provision of the Fair Labor Standards Act, 29 U.S.C. §215(a)(3), because the personnel director reporting unlawful employment practices was "just doing her job"?

PARTIES

LORI G. McKENZIE,

Petitioner,

and

RENBERGS, INC., and ROBERT L. RENBERG,

Respondents.

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I. STATUTE INVOLVED

§ 215. Prohibited acts; prima facie evidence

(a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person—...

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee...

29 U.S.C. § 215(a)(3).

II. INTEREST OF AMICUS

The SHRM is the leading voice of the human resource profession, representing the interests of more than 70,000 individual professional and student members from around the world. It represents neither employers nor employees. Rather, it is an independent association of professionals, dedicated to (1) enhancing the role of the human resource expert in the community, and (2) achieving the highest ethical standards and levels of professionalism. These goals are accomplished through education, programs of certification, and development of local chapters of SHRM, where human resource professionals meet and exchange ideas and experiences.

The SHRM has its own Code of Ethics and is not unlike many other professional associations. SHRM is unique, however, in that its members are in a key position to achieve voluntary compliance with some of the most important laws passed in the last sixty years; laws designed to

improve the lot of working people and to eliminate oppressive and discriminatory working conditions. The primary goal of the Society and its members is to further effective personnel and human resource management. Accordingly, SHRM has a direct interest in the development and enforcement of the myriad laws and regulations governing every aspect of employment.

As human resource professionals, SHRM members work directly with a great variety of employers and employees from all backgrounds on a wide range of employment issues. Through this work, SHRM members gain immeasurable insight into employer wage and hour practices and the effect of new and existing laws, regulations and court decisions. In their front line positions in the workforce, SHRM members are among the first individuals to perceive the inevitable, unforeseen effects that result when such laws, regulations, court decisions and programs are applied in the workplace. Thus, SHRM members are uniquely qualified to (1) bring relevant matters to the attention of the Court which have not been raised by the parties, and (2) comment upon the potential impact of the Court's action in this proceeding.

Every member of the Society is responsible for upholding all laws relating to employer activities and providing advice and guidance to their employers regarding the obligations imposed on employers by statutes such as the FLSA. Though the SHRM membership is diverse, the members share a single concern: they are unified in their belief that the decision of this Court would have a direct and dramatic impact on the ability of human resource professionals to properly perform their jobs.

III. STATEMENT OF THE CASE

Lori G. McKenzie (McKenzie) began working for Renbergs, Inc. (Renbergs), as a receptionist in July 1984, and was quickly promoted to assistant personnel director in October 1984. In May 1985, she was named personnel director, thus becoming responsible for Renbergs' compliance with both state and federal laws relating to equal employment opportunity, wage and hour matters, and numerous other employment related laws regulating the workplace. See Answer Brief of Appellee, pp. 6, ¶2 & 7, ¶4.

In August 1991, Marsha McElroy (McElroy), Renbergs' personnel controller, attended a wage and hour seminar. After the seminar, McElroy advised McKenzie she was worried about several wage issues at Renbergs, and asked McKenzie to review the seminar materials she received. After reviewing the materials, discussing the matter with McElroy and Renbergs' payroll manager, Garnetta Glissman, and reviewing Renbergs' payroll records and time cards, McKenzie believed Renbergs' compensation practices for sales associates and department managers were not in compliance with the FLSA. Specifically, McKenzie believed these employees were improperly classified as exempt from the FLSA and thereby denied overtime compensation. See App. App., pp. 66-76.

McKenzie decided to report the problems to Renbergs' labor attorney, Steve Andrew (Andrew). On September 4, 1991, McKenzie and McElroy met with Andrew and McKenzie told him Renbergs was not in compliance with the FLSA. Later that same day, McKenzie informed Renbergs' president, Robert L. Renberg of the wage and hour problems. McKenzie continued her efforts to resolve the problems by calling Andrew several times to discuss the matter. McKenzie also told Mr. Renberg on September 6, 1991, Andrew had not returned her calls and

she was still concerned with the wage practices. Two weeks later, Mr. Renberg fired Mckenzie stating he had "lost confidence" in her. See App. App., pp.78-85, 88-90.

McKenzie filed a wrongful termination suit under Section 215(a)(3) of the FLSA against Appellees, Renbergs and Mr. Renberg. The jury returned a verdict in favor of McKenzie upon this claim, finding McKenzie "was terminated by [the Respondents] in retaliation for reporting her belief that Renbergs was in violation of the Fair Labor Standards Act." Despite the jury's finding, the District Court, thereafter, entered judgment as a matter of law for Renbergs. The court reasoned even if McKenzie had been unlawfully retaliated against, Renbergs could not have been held liable under the FLSA because Renbergs would have been justified in firing her for notarizing a "sex contract". McKenzie appealed. See Appellant's Brief in Chief, pp. 2-4.

Although the Tenth Circuit rejected the lower court's reasoning, the appellate court affirmed the trial court's decision in favor of the Appellees on alternative grounds holding McKenzie had not engaged in activity protected under §215(a)(3). McKenzie v. Renbergs, 94 F.3d 1478 (10th Cir. 1996). The court reasoned that when McKenzie informed the company of its FLSA violations, she did not *assert* a right adverse to the company, but rather, she merely acted as personnel director on behalf of the company. Id. at 1486.

McKenzie petitioned for rehearing and the SHRM submitted an *amicus curiae* brief in support of McKenzie's petition. The Tenth Circuit, however, denied McKenzie's Petition for Rehearing and McKenzie initiated the instant proceeding.

IV. SUMMARY OF ARGUMENT

The Tenth Circuit's decision poses the potential for extensive destructive effects on the human resource community. In holding a human resource director's intra-corporate reports of federal wage and hour violations is not activity protected by the FLSA, the Tenth Circuit has impermissibly excluded such individuals from FLSA retaliation protection. The analysis of the Tenth Circuit in affirming judgment as a matter of law granted in favor of Renbergs is incorrect and inconsistent with (1) FLSA law, and (2) the essential purpose of employment related anti-retaliation statutes.

A critical review of FLSA precedent reveals the long-standing position of this Court that (1) the purpose of the FLSA was to protect workers from unfair or oppressive employment practices, and (2) the protective scope of the FLSA must be liberally construed so as to effectively provide this protection. Similarly, an insightful review of federal case-law applying the anti-retaliation provisions of several employment related statutes including, but not limited to, the FLSA, 29 U.S.C. §215(a)(3), Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C §2000(e)(3)(a), and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §623(d), demonstrate an employee's intra-corporate report of unlawful conduct is protected activity even if making such a report is "just doing her job". For these reasons, the Petition for a Writ of Certiorari should be granted.

V. ARGUMENT AND AUTHORITY WHY CERTIORARI SHOULD BE GRANTED

A. MCKENZIE'S ACTIONS FALL SQUARELY WITHIN THE INTENDED PROTECTION OF THE ANTI-RETALIATION PROVISION OF THE FLSA

Voluntary compliance with employment laws is favored and encouraged. Intense, ever-present governmental regulation and prosecution is abhorrent in our society and should be used as a last resort. Voluntary compliance cannot be achieved, however, if an employee, including a personnel director, fears she may be fired or otherwise jeopardize her job by reporting her employer's wage/hour violations. In any company, the individual performing the human resource function is the key person to achieve voluntary compliance with the law.

In 1960, this Court firmly articulated the public policy which Congress sought to promote in enacting §215(a)(3) of the FLSA. In Mitchell v. DeMario Jewelry, Inc., 361 U.S. 288 (1960), this Court stated:

> the central aim of the [FLSA] was to achieve, in those industries within its scope, certain minimum labor standards....For weighty practical and other reasons, Congress did not seek to secure compliance with prescribed standards through continuing detailed federal supervision or inspection of payrolls. Rather, **it chose to rely on information and complaints received from employees seeking to vindicate rights claimed to have been denied. Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances.** This end the prohibition of §15(a)(3) against discharges and other discriminatory practices was designed to serve...By its proscription of retaliatory acts set forth in §15(a)(3),...Congress

> sought to foster a climate in which compliance with the substantive provisions of the [FLSA] would be enhanced.[1]

The FLSA was designed to prevent employee reports of unlawful activity from taking on the character of a "calculated risk". Id. at 292-93. Employees may feel reporting such activity presents a situation wherein the employee must weigh the effort to correct deficiencies under the FLSA against the risk of discharge and total loss of wages. Id. In this situation, the Court concluded:

> employees understandably might decide that matters might be best left as they are. We cannot read the Act as presenting those it sought to protect with what is little more than a Hobson's choice.

Id.

The effect of DeMario is clear. The FLSA's anti-retaliation provision was designed to encourage employees to report employment practices which do not comply with the requirements of the Act without fear that such reports will jeopardize their jobs. In short, if an employee reports her employer's violations of the FLSA, then she is protected by the FLSA's anti-retaliation provision.

The Tenth Circuit's decision below, that the reports of FLSA violations McKenzie made to her superiors do not constitute protected activity under §215(a)(3), clearly contradicts DeMario. The fundamental purpose of §215(a)(3) was to encourage voluntary compliance with the FLSA by protecting employees from retaliation for identifying employer violations of minimum labor standards. Personnel directors and other human resource professionals are employees specifically hired by employers to, among other things, identify such violations. When they do, they should not be subject to punishment without recourse to the very laws they seek to uphold. Thus, reports of noncompliance by

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[1] Id. at 292 (emphasis added).

personnel directors and human resource professionals are squarely within the group of actions protected in order to encourage voluntary compliance with the FLSA. Employees such as McKenzie, as the DeMario Court stated, must "feel free to approach officials about...grievances."

Excluding human resource professionals from the protective ambit of §215(a)(3) will have devastating effects on the accomplishment of Congress' intent. The decision of the Tenth Circuit in this case will in fact discourage personnel directors, human resource directors, equal employment opportunity coordinators, and other like employees from investigating and reporting actual FLSA violations, potential violations, and violations of other employment laws. Such employees may choose to hide their FLSA concerns rather than risk jeopardizing their job security. Voluntary compliance cannot be achieved when employees like McKenzie are encouraged to hide their knowledge or suspicions of violations of the FLSA.

Moreover, the Tenth Circuit's decision creates a Hobson's Choice for human resource professionals. They must choose between: (a) voicing FLSA concerns, thus subjecting themselves to discharge for "doing their job", or (b) failing to make known their FLSA concerns, thus being subject to discharge for "**not** doing their job". The latter choice carries the additional risk that yet undisclosed FLSA violations will continue to harm innocent employees who are not aware of the rights they are being denied. Notions of common sense and fairness dictate human resource professionals should not be forced to make this "no-win" choice.

An additional Hobson's choice is created when one considers the SHRM's Code of Ethics its 70,000 human resource professional members must abide by. See Appendix

A.[2] The Tenth Circuit's decision forces those persons to choose between (a) fulfilling their ethical obligations by reporting FLSA violations and then being subject to discharge, or (b) ignoring their ethical duties to protect their jobs. This result ignores the fact the SHRM Code of Ethics promotes voluntary compliance with the law and, therefore, is directly supportive of the public policy pronounced in DeMario.[3] The Tenth Circuit's decision renders the SHRM's Code of Ethics virtually meaningless. By holding a personnel director's intra-corporate reports of FLSA violations are not protected, the appellate court extinguished the legal protections of the FLSA thereby placing a heavy burden on all human resource professionals who discharge their ethical duties.

In sum, the ruling of the Tenth Circuit poses the precise result this Court feared and concluded in DeMario the FLSA was intended to prevent. Accordingly, the Court must grant certiorari and find McKenzie engaged in activity protected by the FLSA in order to promote voluntary compliance with the law.

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[2] McKenzie's actions taken on behalf of the sales associates and department managers are in conformity with the SHRM Code of Ethics in all respects.

[3] Courts have noted the importance of professional ethics codes. See Pierce v. Ortho Pharmaceutical Corp., 417 A.2d 505 (N.J. 1980)(holding a professional code of ethics may express a clear mandate of public policy); Mariani v. Rocky Mountain Hospital, 902 P.2d 429 (Colo. Ct. App. 1994)(finding wrongful discharge claim established by accountant discharged for complying with Colorado State Board of Accountancy Rules of Professional Conduct); Kalman v. Grand Union Co., 443 A.2d 728 (N.J. Super. Ct. App. Div. 1982)(ruling pharmacist's discharge voidable as contrary to public policy where employer terminated pharmacist after he reported employer's attempt to flout state regulations as required by the Code of Ethics of the American Pharmaceutical Association); Klages v. Sperry Corp., 118 LRRM 2463 (E.D. Pa. 1984)(finding attorney's code of professional ethics defined public policy supporting wrongful discharge claim for corporate general counsel terminated after attempting to investigate potential violations of federal and state securities laws.

B. THE FLSA MUST BE LIBE[RALLY CONSTRUED TO PROTECT ALL EMI]PLOYEES FROM OPPRESSIVE EMPLOYM[IENT PRACTICES]

To hold a personnel director[']s intra-corporate reports of wage/hour violations is not protected activity under §215(a)(3) contradicts **this Court['s long-standing policy that the FLSA must not be narro]wly interpreted so as to hinder the protective purpose of t[he FLSA.** In Tennessee Coal, Iron & Railroad Co. v. Musc[oda Local No. 123, 321 U.S. 590 (1944), this Court was co]nfronted with determining whether underground travel in iro[n ore mines constitutes work or employment for which cor[mpensation must be paid within the meaning of the FLSA. In light of conflicting interpretations based on the actua[l activities pursued and prior custom and contract in the min[es, this Court articulated how the FLSA must be construed. T[his Court stated:

> Such an issue can be reso[lved only by discarding formalities and **adopting a realistic attitude**, recognizing that we are dea[ling with human beings and with a statute that is inte[nded to secure to them the fruits of their toil and exer[tion.

Id. at 592 (emphasis added). The Co[urt applied this "realistic attitude" to the definitions of "em[ploy" and "production" contained in the FLSA and held t[he employees must be compensated for the underground t[travel time. The Court reasoned **the FLSA is remedial and humanitarian in purpose and, therefore, "must n[ot be interpreted or applied in a narrow, grudging manner."** Id. at 597 (emphasis added).

Similarly, in United States v. Rosenwasser, 323 U.S. 360 (1945), faced with determining w[hether the FLSA covers piece-rate employees so as to subject[t their employers to the FLSA's criminal provisions, this Cour[t explained the intended purpose and construction of the FLSA as follows:

> Neither the policy of the Act nor the legislative history gives any real basis for excluding piece workers from the benefits of the statute. This legislation was designed to raise substandard wages and to give additional compensation for overtime work as to those employees within its ambit, thereby helping to protect this nation from the evils and dangers resulting from wages too low to buy the bare necessities of life and from long hours of work injurious to health. No reason is apparent why piece workers who are underpaid or who work long hours do not fall within the spirit or intent of this statute, absent an explicit exception as to them.

Id. at 361. Finding support for its conclusion in the express language of the FLSA, the Court added:

> A broader or more comprehensive coverage of employees within the stated categories would be difficult to frame. [Congress'] use of the words "each" and "any" to modify "employee," which in turn is defined to include "any" employed individual, leaves no doubt as to the Congressional intention to include all employees within the scope of the Act unless specifically excluded.

Id. at 362-63 (citing 81 Cong. Rec. 7657, Senator Black's statement on the floor of the Senate that under the FLSA the term "employee" had been given "the broadest definition that has ever been included in any one act").

This Court's decisions in Muscoda and Rosenwasser demonstrate the protective scope of the FLSA must be liberally construed regardless of whether it is the overtime compensation, anti-retaliation, or any other provision of the FLSA which is at issue. **The FLSA *as a whole* was designed "to protect this nation from the evils and dangers resulting from" unfair and oppressive employment practices. Therefore, the FLSA *as a whole* must be liberally interpreted in its application.** Moreover, §215(a)(3) clearly states employers may not retaliate against

"any employee" on account of the employee's report of unlawful activity. In short, §215(a)(3) protects all employees from retaliation, not all employees except those who report wage/hour violations in their capacity as a human resource professional. Such an exception cannot be read into the FLSA.

To protect human resource professionals, like McKenzie, from retaliation due to internal reports of wage/hour violations facilitates the remedial and humanitarian purpose of the FLSA. This policy underlying the FLSA was not intended to be filled with technicalities, therefore, the Court should grant certiorari and adopt the "realistic attitude" articulated in Muscoda.

C. INCLUSION OF MCKENZIE AND OTHER HUMAN RESOURCE PROFESSIONALS WITHIN THE PROTECTIVE AMBIT OF §215(a)(3) "MAINTAIN[S] UNFETTERED ACCESS TO STATUTORY REMEDIAL MECHANISMS"

Interpreting the protective scope of an employment-related anti-retaliation provision is not an issue foreign to this Court. In fact, the Court very recently was asked to determine whether Section 704(a) of Title VII of the Civil Rights Act of 1964, (a) protected "former employees" from unlawful retaliation such that a former employee may sue a former employer for allegedly retaliatory post-employment actions, or (b) only protected "current employees" from retaliatory action s of employers.

In Robinson v. Shell Oil Company, 1997 WL 63007 (U.S.), Charles Robinson Sr. filed a charge with the EEOC

claiming Shell Oil Co. unlawfully discharged him on account of his race. While that charge was pending, Robinson applied for a job with another company. That company contacted Shell, as Robinson's former employer, for an employment reference. Robinson subsequently filed suit under §704(a) against Shell alleging unlawful retaliatory discrimination. Robinson claimed Shell gave him a negative reference in retaliation for his having filed the EEOC charge. Adhering to Fourth Circuit precedent that §704(a) does not apply to former employees, the district court dismissed Robinson's action. The Fourth Circuit affirmed the dismissal and Robinson appealed.

The Supreme Court reversed the appellate court's decision and held that "former employees" are included within the protective ambit of §704(a). Robinson at 5. Justice Thomas delivered the opinion of the Court and explained several grounds underlying the Court's decision. Id. at 3-5. First, the Court reviewed the express language of §704(a) and found that "there is no temporal qualifier in the statute such as would make plain that §704(a) protects **only** persons still employed at the time of the retaliation." Id. at 3 (emphasis added). Second, the Court looked at Title VII's definition of "employee" and found that it "likewise lacks any temporal qualifier" limiting its meaning to current employees. Id. Third, relying upon its interpretation of the FLSA's anti-retaliation provision in DeMario, *supra*, the Court stated that a primary purpose of anti-retaliation statutes is "maintaining unfettered access to statutory remedial mechanisms". The Court found that "it would be destructive of this purpose...for an employer to be able to retaliate with impunity against an entire class of acts under Title VII",

therefore, former employees are included within §704(a)'s coverage.

This Court's analysis of the scope of anti-retaliation provisions in Robinson is directly applicable to the instant case. In Robinson, this Court was asked to determine whether Title VII's anti-retaliation provision protects (a) all employees (current and former), or (b) all employees **except** "former employees". Similarly, in the instant action this Court is asked to determine whether the FLSA's anti-retaliation provision protects (a) all employees who report violations of the FLSA, or (b) all employees who report violations of the FLSA **except** human resource professionals.

The SHRM believes the Court should reach the same conclusions here that it reached in Robinson and, in accordance with those conclusions, find that McKenzie is protected under the FLSA. First, the express language of the FLSA's anti-retaliation provision, like §704(a) of Title VII, does not limit its protective scope to a particular class of employees. There are no qualifiers which evidence a clear intent to exclude human resource professionals or other like employees from the protective scope of §215(a)(3). Likewise, the FLSA's definition of "employee" lacks any qualifiers limiting its meaning to all employees except human resource professionals who by reporting FLSA violations are "just doing their job". Third, a primary purpose of the FLSA's anti-retaliation provision is to "maintain unfettered access to statutory remedial mechanisms". This purpose clearly underlies §215(a)(3) considering the fact that this Court relied upon its interpretation of the FLSA's anti-retaliation provision in DeMario to support its holding and interpretation of Title VII's anti-retaliation provision in Robinson.

McKenzie's termination from employment at Renbergs for reporting FLSA violations constitutes a cognizable retaliation claim under the FLSA. This Court's finding in Robinson, that §704(a) of Title VII protects all employees (including former employees) from unlawful retaliation, was based on the **same authority and reasoning now offered by the SHRM** to support a finding that §215(a)(3) protects all employees (including human resource professionals) from unlawful retaliation. The FLSA cannot provide an effective remedy for retaliation if the Court allows the fear of retaliation to deter McKenzie and every other personnel director, equal employment coordinator, human resource director, or similar official from making good faith reports of company FLSA violations. For these reasons, this Court should grant McKenzie's Petition for a Writ of Certiorari and reverse the Tenth Circuit's decision to exclude McKenzie from the protective scope of §215(a)(3).

D. THERE IS NO AUTHORITY TO EXCLUDE AN EMPLOYEE FROM THE PROTECTIVE AMBIT OF §215(a)(3) BECAUSE SHE WAS "JUST DOING HER JOB"

The Tenth Circuit ruled McKenzie was not protected under §215(a)(3) of the FLSA because she "never crossed the line from being an employee merely performing her job...to an employee lodging a personal complaint about the wage and hour practices of her employer and *asserting* a right adverse to the company". McKenzie, *supra* at 1486. The effect of the appellate court's ruling is that any employer can terminate its human resource professional who discovers and informs the employer it may be violating the FLSA. McKenzie's Petition for a Writ of Certiorari must be granted

to correct this result. The notion that "just doing one's job" excludes a human resource professional from the protective scope of §215(a)(3) must be rejected.

In 1991, the United States Court of Appeals for the Fifth Circuit defined what it means to "assert FLSA rights" under §215(a)(3). In York v. Wichita Falls, 944 F.2d 236 (5th Cir. 1991), Gary Broyles, Battalion Chief and union president, showed the Fire Chief for the City of Wichita Falls, Texas, a memo discussing a recent decision handed down by this Court and asked if the fire fighters were due any overtime pay in light of the Court's decision.[4] The City subsequently reduced the fire fighter's wage rate to offset the increased cost of overtime pay. All 139 fire fighters employed by the City filed suit against the City claiming that the City unlawfully reduced their wage rate in response to their assertion of coverage under the FLSA. The district court concluded the FLSA's assertion of coverage requirement should be liberally construed, therefore, Broyles' conversation with the Fire Chief constituted an "assertion of coverage" for all fire fighters under the FLSA, bringing them within its protective scope. The City appealed.

Affirming the lower court, the Fifth Circuit defined the "assertion of coverage" requirement of §215(a)(3) as follows:

> Because [the FLSA] prohibits an employer's retaliatory acts because an employee assets coverage, the employee must take some actions which a reasonable employer would consider an assertion that

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[4] Broyles' memo discussed Garcia v. San Antonio Metro Transit Authority, 469 U.S. 528 (1985), which recognized public and private employers have to meet the overtime and minimum-wage requirements of the FLSA.

> employees are entitled to the overtime pay or other benefits conferred by the FLSA.

York at 241. Applying this definition and ruling "one employee may assert coverage on behalf of all...and the fact the person who asserted coverage may...be...exempt from the FLSA is not fatal", the court held Broyles' inquiry regarding the effect of the Garcia decision could constitute a reasonable assertion of coverage. Id. Furthermore, considering the fact Broyles was a union leader, the court ruled the City should have reasonably viewed Broyles as a spokesman for the fire fighters as a whole. Id.

Applying York to the case at bar, it is plain that McKenzie's acts constituted an "assertion of FLSA coverage." The facts in York are strikingly similar to the facts presented to this Court. First, McKenzie took actions which a reasonable employer would consider an assertion of rights under the FLSA. McKenzie discovered certain employees were entitled to overtime compensation they were not receiving and, like Broyles, she reported this information to her superiors. McKenzie's continued pursuit of attention and action form her superiors certainly amounts to "advocating the rights of' or "asserting coverage on behalf of' the sales associates and department managers.

Second, McKenzie reasonably should have been viewed as a spokesperson for the lawful rights of Renberg' employees as a whole. As personnel director, one of the core purposes of McKenzie's employment was to ensure Renbergs' observance of rights granted to all its employees by federal and state labor and employment statutes, including the FLSA. Her duties were: (a) determining whether

Renbergs was complying with the FLSA; (b) if Renbergs was not in compliance, attempting to achieve voluntary compliance; and (c) keeping Renbergs in compliance. By holding McKenzie's actions do not amount to "asserting a right adverse to the company," the Tenth Circuit failed to consider this core purpose of McKenzie's employment. McKenzie and every other personnel director, equal employment coordinator, human resource director, or similar official, who makes good faith reports of company FLSA violations and inquiries of potential violations must be protected under §215(a)(3). Such acts are fundamentally "assertions of employee rights."

The SHRM's position is consistent with the treatment of human resource professionals under anti-retaliation provisions in other employment-related statutes. The anti-retaliation provisions of Title VII and the ADEA have been interpreted to protect human resource professionals and other employees who inform their employers that they are acting unlawfully.[5] The import of these decisions is clear. Human

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[5] See Maldonado v. Metra, 743 F. Supp. 563 (N.D. Ill. 1990)(holding Title VII's anti-retaliation provision protects personnel director who made comments to superiors that employer's hiring practices possibly discriminated against minorities); Chandler v. Fast Lane, Inc., 868 F. Supp. 1138 (E.D. Ark. 1994)(ruling manager exercising authority to promote and employ African-Americans engaged in protected activity under Title VII); Burston v. Commonwealth of Virginia, 35 FEP Cases 1825 (E.D. Va. 1984)(finding equal employment opportunity officer terminated in retaliation for aggressive activities on behalf of minorities engaged in protected activity under Title VII); Wallis v. J.R. Simplot Co., 26 F.3d 885 (9th Cir. 1994)(holding human resources director proposed speech to employer's management personnel which he shared with this employer constituted protected activity under Title VII); Kristufek v. Hussmann Foodservice Co., 985 F.2d 364 (7th Cir.

resource professionals, like McKenzie, are protected from retaliation even if they are "just doing their job" by reporting noncompliance with the law to their employers.

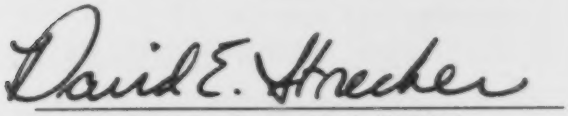
VI. CONCLUSION

It is true that McKenzie's job was to ensure compliance with the FLSA. In doing her job to the utmost, she lost it. This is unjust. Even more unjust is the icy judicial reception given to one who sought to uphold a law which this Court has said must protect as many people as possible. McKenzie's Petition for a Writ of Certiorari should be granted because her cause and that of those she sought to protect are one and the same. If McKenzie loses, so does the worker.

1993)(finding human resources executive engaged in ADEA protected activity when he informed his employer on several occasions that terminating an employee would violate the ADEA).

Respectfully submitted,

STRECKER & ASSOCIATES, P.C.



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Dated this 19th day of March, 1997.

APPENDIX A

HR
SOCIETY FOR
HUMAN
RESOURCE
MANAGEMENT

CODE OF ETHICS

As a member of the Society for Human Resource Management, I pledge myself to:

- Maintain the highest standards of professional and personal conduct.
- Strive for personal growth in the field of human resource management.
- Support the Society's goals and objectives for developing the human resource management profession.
- Encourage my employer to make the fair and equitable treatment of all employees a primary concern.
- Strive to make my employer profitable both in monetary terms and through the support and encouragement of effective employment practices.
- Instill in the employees and the public a sense of confidence about the conduct and intentions of my employer.
- Maintain loyalty to my employer and pursue its objectives in ways that are consistent with the public interest.

- Uphold all laws and regulations relating to my employer's activities.
- Refrain from using my official positions, either regular or volunteer, to secure special privilege, gain or benefit for myself.
- Maintain the confidentiality of privileged information.
- Improve public understanding of the role of human resource management.

This Code of Ethics for members of the Society for Human Resource Management has been adopted to promote and maintain the highest standards of personal conduct and professional standards among its members. By joining the Society, a member espouses this Code, thereby assuring public confidence in the integrity and service of human resource management professionals.

Supreme Court, U.S.
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NO. 96-1293

In The
Supreme Court of the United States
October Term, 1996

LORI G. McKENZIE,
Petitioner

vs.

RENBERG'S, INC. and ROBERT L. RENBERG,
Respondents

On Petition For Writ of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

REPLY TO BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a personnel director who has formed a good faith belief that her employer is violating the overtime pay requirements of the Fair Labor Standards Act engages in "protected activity" under §15(a)(3) of the Act when she reports her belief to the company's attorney and then to its president and principal owner, persists in that belief and then is fired in retaliation for expressing her belief.

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PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

Pursuant to Supreme Court Rule 15, Subdivision 6, Petitioner hereby replies to the Respondent's Brief in Opposition. In summary, Respondents' argument of the facts is misdirected. Respondents ignore compelling authority in favor of Petitioner's position. Respondents invite error by confusing "opposition" activity with "participation" activity.

I.
RESPONDENTS' ARGUMENT OF THE "FACTS" IS MISDIRECTED

Respondents attempt to point out misstatements of facts contained in the Petition for Certiorari (Brief in Opposition, pp. 3,4,5,12,15). Rather than address each of these attempts with citations to the record, Petitioner is satisfied to rely upon the Court of Appeals' own recitation of the facts (Petition, Appendix B, pp. 21a–23a). The Court there recognized quite accurately that the parties vigorously disputed the facts at trial. However, the Court's concern there, as should be this Court's concern, was whether under the Petitioner's evidence she had engaged in protected activity under the Fair Labor Standards Act.

The Court there noted that the District Court had instructed the jury that "good faith reporting or communicating concerns regarding possible FLSA violations is protected activity". By its decision in this matter, the Court of Appeals held that this instruction was erroneous as a matter of law. For, in the absence of the Petitioner's

stepping outside her role as an employee, her activity (no matter how the jury viewed it) could not be protected under the Act. It is this legal conclusion that the Petitioner attacks here. Respondents should not be heard to argue the facts when it is the law that is in question.

II.
RESPONDENTS' IGNORE THAT PETITIONER HAS HER OWN INDEPENDENT DUTIES UNDER THE FAIR LABOR STANDARDS ACT

In Subsection B of her Petition, Petitioner demonstrated that the Act imposed independent legal duties upon her as the personnel director of Renberg's. As such, the Act recognized her (and requires the courts to recognize her) as independent from her employer. Respondents fail to dispute this proposition; instead, they argue that the Court of Appeals' decision is not to the contrary.

Yet, Petitioner asserts that the decision under review is quite to the contrary. If Petitioner is independently subject to civil and criminal penalties for overtime pay violations, then she **cannot** be required to "cross the line". The law, by its very requirements, has already placed her over that line.

As Petitioner stated in her Petition (Petition, p. 8), the issue in this case is whether the independent legal duties imposed upon a personnel director are to be preferred over that person's status as a member of management. Petitioner maintains, and this Court should hold, that her status as employee must yield to the law in these circumstances. Such was the intent of Congress. This Court should countenance no other conclusion.

III.
RESPONDENTS' ERRONEOUSLY CONFUSE "OPPOSITION" ACTIVITY WITH "PARTICIPATION" ACTIVITY

At page 5 et seq. of the Respondents' Brief in Opposition, Respondents erroneously introduce the concept of "opposition" activity to the application of §15(a)(3) of the Fair Labor Standards Act. While not quoting directly from Title VII's employee protection statute (42 U.S.C. §2000 e–3) which protects employees from retaliation for both "opposition" activity and "participation" activity, Respondents repeatedly entreat the Court to read §15(a)(3) as if it covers both types of activity. To do so may serve the Respondents' purposes. Yet this confusion fails to provide this Court with able assistance in reviewing the Petitioner's Petition for Certiorari.

As stated above, the sole issue to be resolved on certiorari is the correctness of the District Court's instruction that, as a matter of law, the "good faith reporting or communicating concerns regarding possible FLSA violations is protected activity". By reporting her concerns, Petitioner invoked the proper corporate channels to investigate claims or proceedings that may be filed under the Act; she also alerted the company that she would be required to present testimony with regard to a claim or proceeding under the Act.

Respondents' attempt to blur the distinction between "opposition" activity and "participation" activity is mischievous. In a case cited on page 15 of Respondents' Brief, Booker v. Brown & Williamson Tobacco Co., Inc., 879 F.2d 1304 (6th Cir. 1989), the Sixth Circuit noted that:

> the distinction between employee activities protected by the participation clause and those protected by the opposition clause is significant because federal courts have generally granted less protection for opposition than for participation in enforcement proceedings.

879 F.2d 1304, 1312.

Respondents would have this Court judge Petitioner's participation activity under the stricter guidelines which apply to opposition activity.

The Court of Appeals in Booker went on to illustrate the breadth that has been given to protection of an employee under the participation clause and noted the limitations upon such protection under the opposition clause. Under the facts before it, the Booker court held that a "vague charge of discrimination . . . is insufficient to constitute opposition to an unlawful employment practice", 879 F.2d 1304, 1313.[1]

Thus the Respondents invite this Court to indulge in the same error as did the Court of Appeals in this case: to require an employee to go beyond mere advocacy and to oppose in specific and direct terms an action of the employer. While such a requirement may be appropriate to gauge opposition activity, Petitioner asserts it has no place in gauging participation activity of the type involved here.

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[1] To the same effect, see the other case cited at page 17 of the Respondents' Brief in Opposition, Aldridge v. Tougaloo College, 847 F.2d 480 (S.D. Miss. 1994), where an employee's complaint of unfair treatment did not invoke the opposition clause of Title VII. To the same effect, see Garcia-Paz v. Swift Textiles, Inc., 873 F.Supp. 547 (D.Ks. 1995) wherein opposition to "paradigms" and "inflexibility" was not sufficiently specific to constitute opposition to age discrimination.

Petitioner's reporting of her concerns to her employer alerted the company of the potentiality of adverse claims and proceedings for which she herself could be held liable. More significantly, she alerted the company that her testimony in such proceedings would be adverse to the company, or adverse to her own interest.

Still yet, there was no vagueness or lack of specificity in Petitioner's explanation of her concerns to the company attorney and its president. She directed their attention specifically to the overtime requirements of the Fair Labor Standards Act. She specifically expressed her belief that the company's practices violated the Act with regard to two broad categories of employees. That she asked the company attorney for his opinion at the same time does not detract from the obvious purpose of her visit to the attorney's office: to alert the proper corporate authorities of suspected illegalities.

Petitioner's conduct fits easily within the protective reach of §15(a)(3); more easily, in fact, than the actions of employees in other cases which have been found to be covered by the Act. In Love v. RE/MAX of America, 738 F.2d 383 (10th Cir. 1984), the employee, a vice–president, wrote a memo to the president asking for a raise, to which she attached a copy of the Equal Pay Act. In EEOC v. Romeo Community Schools, 976 F.2d 985 (6th Cir. 1992), the employee, a custodian, complained to her employer that she believed it was "breaking some sort of law". In Cuevas v. Monroe Street City Club, Inc., 752 F.Supp. 1405 (N.D. Ill. 1990), employee Robinson complained at a staff meeting that he "was not getting paid for certain things he was doing".

Similarly, in York v. Wichita Falls, 944 F.2d 236 (5th Cir. 1991), the Court of Appeals found that simply

handing a legal memorandum to, and asking a question of, a supervisor could be considered an assertion of rights under the Act.[2]

By these examples, lack of clarity or directness of purpose has never been an impediment to invoking the protection of §15(a)(3). In none of these cases did the court have difficulty in finding that the employee had sought "access to statutory remedial mechanisms". Neither should this Court succumb to the Respondents' sophistry.

IV.
GUIDANCE FROM THIS COURT IS NEEDED TO GUARANTEE "UNFETTERED ACCESS TO STATUTORY REMEDIAL MECHANISMS"

As ably pointed out in the Amicus Curiae Brief in Support of Petitioner's Petition for Writ of Certiorari submitted herein by the Society for Human Resource Management, this Court has recently repeated that the primary purpose of anti-retaliation statutes is: to maintain "unfettered access to statutory remedial mechanisms", Robinson v. Shell Oil Company, _____ U.S. _____, 1997 WL 63007 (1997). By granting writ of certiorari in this case, the Court should provide clear guidance to the District Courts and to the Courts of Appeal in protecting employees coming within the ambit of §15(a)(3). To do so now would provide uniformity of enforcement of the Act, rather than the doctrinal confusion that obtains today.

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[2] See also, Drollinger v. State of Arizona, 962 F.2d 956 (9th Cir. 1992), where discussing a recent Supreme Court decision with state officials was considered an assertion of rights under the Act.

WHEREFORE, for the reasons stated in her Petition and in this Reply, Petitioner earnestly prays that this Court grant a Writ of Certiorari to the Court of Appeals.

Respectfully submitted,

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